TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible] 1904.

No. 163, 40

ADOLFO SIXTO, PLAINTIFF IN ERROR,

vs.

LAUREANO SARRIA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

FILED MAY 19, 1903.

(18,938.)

(18,938.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 287.

ADOLFO SIXTO, PLAINTIFF IN ERROR,

vs.

LAUREANO SARRIA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

INDEX.

	Original.	Print.
Declaration	1	1
Appearance for defendant and demurrer filed	3	2
Motion filed	3	2
Demurrer argued and submitted	3	2
Order overruling demurrer	3	3
Order for bill of particulars, &c	4	3
Order filing bill of particulars	5	4
Bill of particulars	5	4
Plea	6	5
Demurrer to plea	9	7
Order overruling demurrer	9	7
Order beginning trial	10	8
Joinder of issue	10	8
Additional plea	11	9
Verdict	12	10
Judgment	12	10
Order granting leave to withdraw exhibits	13	10
Order granting writ of error, &c	13	11

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 25, 1903.

	Original.	Print
Orders granting time to prepare bill of exceptions	15	11
Assignment of errors	16	12
Bill of exceptions	20	15
Testimony of Adolfo Sixto	20	15
Deed, Sixto to defendant	21	16
Testimony of Wm. Koerber	22	17
Ramon Falcon	22	17
Record of court of first instance of Humacao	23	17
Plaintiff rests	34	29
Decree of court of first instance of Humacao	34	29
Order of court of first instance of Humacao	35	31
Objections to additional plea	36	31
Testimony of Laureano Sarria y Gonzalez	37	32
Certificate of registrar of property, &c	42	37
Defendant rests	47	43
Exceptions to charge	48	43
Plaintiff's requests to charge	49	44
Judge's certificate to bill of exceptions	50	45
Petition for writ of error	51	46
Writ of error (original)	52	46
Writ of error (copy)	53	47
Marshal's return	53½	47
Citation	54	48
Bond	55	48
Clerk's certificate	57	49

1 In the United States District Court for Porto Rico.

ADOLFO SIXTO
vs.
LAUREANO SARRIA. } Assumpsit. Damages, $14,000.00.

Adolfo Sixto, who is an alien and a subject of the King of Spain plaintiff, sues Laureano Sarria, who is a citizen of Porto Rico, in an action on the case on promises:

For that, whereas on the 27th day of November, A. D. 1892, the defendant was indebted to one Manuel Sixto, since deceased, in the full and just sum of sixteen thousand dollars, Spanish money, with interest from the 15th, day of May of the same year, which said sum the defendant had promised and agreed to pay to the said Manuel Sixto in four equal annual instalments falling due respectively on the 15th day of May of each and every year from the year 1893 to the year 1896 inclusive; and whereas the said Manuel Sixto departed this life, intestate, on the said 27th day of November, A. D. 1892, leaving two children, the plaintiff and one María Belen Sixto Melendez, as his sole heirs at law, and whereas the plaintiff then and there became and was entitled, as such heir at law of said Manuel Sixto, to one-half part of said indebtedness, of sixteen thousand dollars, Spanish money, so to become due from said defendant as aforesaid, with interest thereon, at the rate of eight (8) per centum per annum from said 15th day of May, 1892, until paid; the defendant being so indebted as aforesaid, then and there in consideration of the premises on the day and year first aforesaid promised and became bound to pay to the plaintiff the said one-half part of the sums aforesaid at the respective times when the same severally became due with interest thereon as aforesaid. Yet, although the several dates on which the said several sums or instalments respectively became due and payable have all long since passed and payment thereof has been demanded, the defendant has not paid to the plaintiff the said several amounts so due to him as aforesaid, nor any of them, nor any part thereof, and the same still remain due to the plaintiff.

And for that, whereas on the 1st day of September, A. D. 1902,
2 the defendant was indebted to the plaintiff, as heir at law of his father the said Manuel Sixto, in the sum of fourteen thousand dollars ($14,000.) for money before that time loaned by said Manuel Sixto deceased, to the defendant at his request; and in the like sum for money before that time received and retained by the defendant for the use of the plaintiff; and in the like sum for the price of lands and tenements before that time granted, conveyed and delivered to the defendant by the said Manuel Sixto in his lifetime, and in the like sum for interest upon money foreborne by the plaintiff to the defendant at his request for divers spaces of time before then elapsed: and, being so indebted as aforesaid, the

defendant then and there in consideration thereof promised the plaintiff to pay him upon request the said several sums of money in this count mentioned.

Yet, the defendant, not regarding his several promises and undertakings, has not paid the plaintiff the said several sums of money hereinbefore mentioned, or any or either of them, or any part thereof though often requested so to do, but to pay the same has wholly neglected and refused, and still does neglect and refuse. To the damage of the plaintiff in the sum of fourteen thousand dollars, and therefore he brings this suit.

(Signed) N. B. K. PETTINGILL,
Attorney for Plaintiff.

3 In the District Court of the United States for Porto Rico.

Present: Honorable Wm. H. Holt, judge.

OCTOBER 13TH, 1902.

Entry journal.

SISTO
vs.
SARRIA.

Appearance of Mr. Mott for defendant and demurrer filed.

(Same day last aforesaid.)

Entry journal.

SIXTO
vs.
SARRIA.

Motion filed.

In the District Court of the United States for Porto Rico.

Present: Hon. Wm. H. Holt, judge.

OCTOBER 22ND, 1902.

Entry journal.

SIXTO
vs.
SARRIA.

Demurrer argued and submitted.

In the District Court of the United States for Porto Rico.

Present: Hon. Wm. H. Holt, judge.

WEDNESDAY, *November 5th*, 1902.

Order in journal.

ADOLFO SIXTO
vs.
LAUREANO SARRIA.

The court hands down the fol-owing order and directs that it be filed and entered.

Order.

4 It is claimed the declaration of the plaintiff should aver a judicial declaration as heir *ab intestato*, that thus only has — the right of title. This is the ground of the demurrer. The plaintiff contends such declaration is not necessary to the right of the heir to sue, but even if so, it is a matter of evidence; need not be avered in the pleading; and that it is only necessary that he is the heir. A plaintiff must *be* his declaration show his right to sue.

It would seem that by the local procedure a judge may in his discretion make a judicial designation of heirship, *ab intestato*, or leave the parties to an ordinary action. Whatever this provision and various others relative thereto may mean it is averred that the plaintiff is the heir of the party to whom the debt was owing and as such heir, having become entitled to half of it, the defendant promissed to pay him. Under the local law the heir has the right to col-ect a debt coming to him by heirship from his ancestor. The averments of the declaration are to be taken as true upon demurrer and it is overruled.

Thereupon comes the defendant by his attorney T. D. Mott, Jr., Esq., and calls up his motion heretofore filed for rule compelling plaintiff to give surety for costs and plaintiff is given until November 6th, 1902 to file affidavit in opposition thereto.

In the District Court of the United States for Porto Rico.

Present: Hon. Wm. H. Holt, judge.

THURSDAY, *November 6th*, 1902.

Entry journal.

ADOLFO SIXTO
vs.
LAUREANO SARRIA.

Now comes the plaintiff herein and by his attorney N. B. K. Pettingill, files affidavit in opposition to defendant's motion for rule for

security for costs. Comes also the defendant by his attorney T. D. Mott, Jr., and files a motion for a bil- of particulars which said motion is granted and bill of particulars ordered to be filed.

5 In the District Court of the United States for Porto Rico.

Present: Hon. Wm. H. Holt, judge.

NOVEMBER 8TH, 1902.

ADOLFO SIXTO
vs.
LAUREANO SARRIA.

Now comes the plaintiff herein by his attorney N. B. K. Pettingill Esq., and files a bill of particulars in persuance of an order entered herein on November 6th, 1902.

Bill of Particulars.

In the U. S. District Court for Porto Rico.

Nov. 8, 1902.

ADOLFO SIXTO
vs.
LAUREANO SARRIA.

Now comes the plaintiff by h*si* attorney, N. B. K. Pettingill and in compliance with the order of the court furnishes the fol-owing bill of particulars of the claim made in plaintiff's declaration.

To one half of the purchase price of a farm in Vieques called "Monte Santo" embracing about 430 acres of land sold by Manuel Sixto, whose heir plaintiff is, to defendant by deed dated May 15th, 1892 executed before Leandro Lara y Torre, notary public.....	$6,400
To interest upon the above amount at the rate of $42 per month from said date May 15th, 1892 to date, compounding monthly as stipulated.....	8,150
	$14,550

N. B. K. PETTINGILL,
At'y for Plaintiff.

6 *Plea. Filed November 11th*, 1902.

In the District Court of the United States for Porto Rico.

ADOLFO SIXTO
vs.
LAUREANO SARRIA. } Plea.

And the defendant, Laureano Sarria, by T. D. Mott Jr., his attorney comes and defends the wrong and injury, when etc.,—and says, that he did not ptomise in manner and form as the plaintiff has above thereof complained against him; and of this he puts himself upon the county, etc.—

And for a further and second plea to the said declaration, the defendant says, that on the fifteenth day of May, righteen hundred and ninety-two, the defendant became indebted in the sum of sixteen thousand dollars (16,000) Mexican dollars, money then current in Porto Rico, to one Manuel Sixto; on account of the purchase price of a farm situated in the island of Vieques, district of Porto Rico, and called "Monte Santo," that on the said fifteenth day of May, eighteen hundred and ninety two, the defendant made and constituted a mortgage upon the said farm in favor of the said Sixto, as security for the payment of the aforesaid amount of sixteen thousand (16,000) Mexican dollars, together with a certain interest as stipulated in the said instrument of mortgage; that thereafter the said mortgage was duly registered in the registry of property of Humacao, Porto Rico, on the eleventh day of July, eighteen hundred and ninety two; that the payment of the aforesaid sum of sixteen thousand (16,000) Mexican dollars, as provided for in the said instrument of mortgage, was to be made in the manner
7 following:—to wit:—four thousand ($4,000) dollars on the fifteenth day of May, eighteen hundred and ninety-three, and four thousand (4,000) dollars on the fifteeth day of May, of the years eighteen hundred and ninety-four, eighteen hundred and ninety-five, and eighteen hundred and ninety-six. And the defendant further says that the aforesaid Manuel Sixto departed this life on the twenty-seventh day of November, eighteen hundred and ninety-two, before any of the instalments aforesaid had fallen due; that the said Sixto died interstate and soon after his death, to wit, in the year eighteen hundred and ninety-three, judicial proceedings touching and respecting the settlement and inheritance of the estate of the said Manuel Sixto, deceased, and which said proceedings are known in the law of Porto Rico as "proceedings *ab intestato*" were instituted in the court of first instance of Humacao, Porto Rico the said court being then and there a court of record and of general jurisdiction, and the said court in said proceedings by a decree dated the fifteenth day of June eighteen hundred and ninety three, ordered the said defendant to pay into and deposit with the said court all

sums of money then due by the said defendant to the said estate of the said Manuel Sixto, deceased, by virtue of the aforesaid mortgage, and the defendant thereupon and in ob-dience to the said order of the said court did on the twenty-second day of June, eighteen hundred and ninety three, consign and deposit with the said court and did place at the disposal of the same the sum of four thousand (4,000) pesos of the money then current in Porto Rico, and the further sum of eight hundred twenty-two and fifty-two hundreths (822.52) dollars of the same kind of money the first sum being the amount of the first instalment due May fifteenth, eighteen hundred and ninety-three, and the second sum being the interest due on the aforesaid mortgage credit up to the first of June, eighteen hundred and ninety-three. And the said decree of the said court was duly entered before the commencement of this action and still is in full force and effect.

And the defendant further says, as to the third instalment above mentioned, that by judgment of the supreme court of Porto Rico, then known as the "audiencia territorial" dated the eighteenth day of February, eighteen hundred and ninety six, rendered
8 and entered in certain foreclosure proceedings had before the said court on appeal from the court of first instance of Humacao, in which proceedings the defendant and one Antonio Roig y Torruellas *was* plaintiff-, and which said proceedings the said Roig, as owner of the third and fourth instalments of the mortgage before mentioned, sought to foreclose the same to the extent of the third instalment aforesaid together with certain interest, the defendant was found to be indebted to the said plaintiff, Roig, in the amount of the third instalment aforesaid together with the corresponding interest and was ordered to pay the amount of said indebtedness so found due by the said judgment, to the said Roig, within the period of thirty days thereof and the said judgment further provided for execution to issue upon the non-compliance with the terms thereof by the defendant. Said judgment was duly entered before the commencement of this suit and is still in full force and effect. And the said defendant thereupon and in compliance with the said judgment of the said court thereafter paid unto the said plaintiff, Roig, the amounts ordered to be paid by the said judgment,—to wit—the amount of the third instalment of the aforesaid mortgage, together with the corresponding interest. And all of this the defendant is ready to verify.

T. D. MOTT, JR.,
Attorney for Defendant.

UNITED STATES OF AMERICA, }
District of Porto Rico. }

Laureano Sarria, being first duly sworn, deposes and says that he is the defendant in the above entitled action, that the foregoing plea has been translated to him and he is acquainted with the contents thereof and that the facts therein mentioned are true.

L. SARRIA.

Subscribed and sworn to before me this 12th, day of November 1902.

RICARDO N-DAL, *Clerk*,
By FRANK ANTONSANTI, *Deputy*.

9 *Demurrer to Plea Filed.*

In the District Court of the United States for Porto Rico.

NOVEMBER 14TH, 1902.

ADOLFO SIXTO
vs.
LAUREANO SARIA. } Assumpsit.

Now comes the plaintiff and demurs to the second and third pleas herein pleaded in behalf of the defendant and says that the same are not sufficient in law, and for causes of demurrer assigns the following:

First. Because the matter- alleged in said pleas, even if true, do not constitute any legal or sufficient defence to plaintiff's cause of action or to the right to claim payment of the instalment referred to herein.

Second. Because said pleas set forth matters concerning an alleged suit or litigation between third parties and the defendant, to which neither the plaintiff nor any privy of his was a party, the result of which is not binding upon the plaintoff's rights.

N. B. K. PETTINGILL,
Attorney for Plaintiff.

I hereby certify that in my opinion the foregoing demurrer is well founded in law, and that the same is not interposed for delay.

N. B. K. PETTINGILL,
Attorney for Plaintiff.

In the District Court of the United States for Porto Rico.

Present: Hon. Wm. H. Holt, judge.

NOVEMBER 14TH, 1902.

Entry journal.

SIXTO
vs.
SARRIA. }

Now comes the plaintiff herein and files a demurrer to defendant's pleas which is overruled. (Demurrer above.)

10 In the District Court of the United States for Porto Rico.

Present: Hon. Wm. H. Holt, judge.

NOVEMBER 14TH.

Entry journal.

ADOLFO SIXTO
vs.
LAUREANO SARRIA.

Now comes the plaintiff herein by N. B. K. Pettingill Esq., his attorney, and files joinder of issue, whereupon said cause coming on regularly for trial, both sides answer ready. Thereupon H. A. Dawson, a member of the regular petit jury is by consent of the parties, excused from the panel in this case. Whereupon the marshal is directed to summon from among the bystanders seven good sober, upright men to serve on the panel in the case. Thereupon the marshal summons W. E. Durstine, E. Curtis, J. E. Turrull, Arturo Ponce de Leon, C. W. Pyke, H. K. Torrey, R. A. Bailey, and C. Goenaga. The jury is impaneled and sworn to try the case composed of the following named persons, to wit.

Silvestre Iglesias, N. Lopez Victoria, P. Van Fleet, J. Steinacher, S. O'Donnell, W. F. Gerwig, H. H. Allen, J. D. Pike, H. W. Ryder, W. E. Durstine, E. Curtis, and C. W. Pike, who hear all the evidence, for plaintiff and part of the evidence for defendant.

Joinder of Issue.

In the U. S. District Court for Porto Rico.

Filed Nov. 14th, 1902.

ADOLFO SIXTO
vs.
LAUREANO SARRIA. } Assumpsit.

Now comes the plaintiff and joins issue upon the pleas of the defendant.

N. B. K. PETTINGILL,
Att'y for Pl'ff.

11 *Additional Plea Filed by Defendant.*

In the District Court of the United States for Porto Rico.

NOVEMBER 15TH, 1902.

ADOLFO SIXTO
vs.
LAUREANO SARRAIA.

And the defendant as to the second installment aforesaid says that he has paid the same, together with the corresponding interest on the 4th day of April 1894, to one Belen Sixto who was then the second owner of said mortgage credit and who had previou*l*sy been declared heir *ab intestado* of the said Manuel Sixto, deceased, by the order and decree of the proper court to wit, the court of first instance of Humacao, respectively on the 21st and 23rd of the month of November 1893.

And as to the 3rd, and 4th instalments the defendant says that on the 11th day of September 1894 the aforesi*a*d Belen Sixto for a valuable consideration ceded and transferred the said two instalments to one Antonio Roig y Torruella, that thereupon the said transfer was duly recorded and the said two instalments appeared upon the record to be the property of the said Roig, and thereupon, to wit, on or about the 16th day of May 1896, the defendant paid the said Roig, the amount of said two instalments together with all interest due.

And all of this the defendant is ready to verify.

T. D. MOTT, JR.,
At'y for Defendant.

U. S. OF A.,
Dist. of P. R.

Laureano Sarria being duly sworn deposes and says that he is the defendant in the foregoing plea mentioned that the said plea has been translated to him and he is acquainted with -he contents and that the same is true.

L. SARRIA.

Subscribed and sworn to before me this 15th day of Nov. 1902.

RICARDO NADAL, *Clerk*,
By H. H. SCOVILLE, *Deputy*..

12 In the District Court of the United States for Porto Rico.

Present: Hon. Wm. H. Holt. judge.

NOVEMBER 17TH, 1902.

Entry journal.

ADOLFO SIXTO
vs.
LAUREANO SARRIA.

Resummed. The jury hears argument of counsel, charge of the court, retir-s and thereafter return into court the following verdict.

" We the jury find for the defendant.

P. VAN FLEET, *Foreman.*"

In the District Court of the United States for Porto Rico.

Present: Hon. Wm. H. Holt judge.

NOVEMBER 19TH, 1902.

Judgment.

ADOLFO SIXTO
vs.
LAUREANO SARRIA.

The above cause having come on regularly for trial the jury heretofore having rendered their verd-ct therein in favor of the defendant.

It is thereupon by virtue of the law and by reason of the premises aforesaid, ordered and adjudged and decreed that the said plaintiff Adolfo Sixto do take nothing by his said suit and that the defendant, the said Laureano Sarria do go hence without day, and *and* further that the said defendant do have and recover from the said plaintiff his costs herein laid out and expended to be taxed by the clerk for which execution may issue.

13 In the District Court of the United States for Porto Rico.

Present: Hon. Wm. H. Holt, judge.

NOVEMBER 19TH, 1902.

Order.

ADOLFO SIXTO
vs.
LAUREANO SARRIA.

The attorneys of the parties to the above action having heretofore signed and filed a stipulation that each of the parties to this cause

shall be at liberty to withdraw such original exhibits as were used and introduced by him as evidence at the trial hereof,

It is therefore hereby ordered that the said parties be and they hereby are permitted to withdraw said exhibits upon leaving the proper receipt with the clerk of the court.

In the District Court of the United States for Porto Rico.

Present: Hon. Wm. H. Holt, judge.

NOVEMBER 26TH, 1902.

Entry journal.

ADOLFO SIXTO
vs.
LAUREANO SARRIA.

Now comes the plaintiff herein by his attorney N. B. K. Pettingill Esq., and files his petition for a writ of error to the Supreme Court of the United States, Whereupon the court makes the following order and directs that it be filed and entered.

Order.

The plaintiff, Adolfo Sixto, having this day filed his petition for a writ of error from the decission and judgment thereon made herein to the honorable the Supreme Court of the United States, and also praying that an order be made enlarging the time for the preparing and presenting of his bill of exceptions to the rulings of the court herein, and said petition having this day been duly allowed:

Now therefore, it is ordered that said plaintiff be allowed a
14 period of ninety days for preparing and presenting to *hte* court his bill of exceptions in this cause, and that he do make and file with the clerk of this court a good and sufficient bond in the sum of one thousand dollars, to the effect that if the said plaintiff and plaintiff in error shall prosecute said writ of error to effect and answer all costs if he fails to make his plea good, then the said obligation to be void, else to remain in full force and virtue.

15 In the District Court of the United States for Porto Rico.

FEBRUARY 26TH, 1902.

Order Extending Time.

ADOLFO SIXTO
vs.
LAUREANO SARRIA.

A stipulation is filed herein and in conformity thereto it is ordered that plaintiff shall have an extension of fifteen days from this date for preparing and presenting his bill of exceptions.

In the District Court of the United States for Porto Rico.

Present: Hon. W. H. Holt, judge.

MARCH 23RD, 1902.

Order Extending Time.

ADOLFO SIXTO
vs.
LAUREANO SARRIA.

The parties filed stipulation herein and by consent the time for preparing and presenting plaintiff's bill of exceptions is extended until April 11th, 1903.

16 In the United States District Court for Porto Rico, October Term, A. D. 1902.

ADOLFO SIXTO
vs.
LAUREANO SARRIA. } Assignment of Errors.

Comes the plaintiff in the above entitled cause, by his attorney N. B. K. Pettingill, and assigns the following as the errors committed by the court aforesaid in the course of the trial and proceedings in said cause:

I.

The court erred in overruling the demurrer of plaintiff to the pleas filed therein by defendant on November 11, 1902.

II.

The court erred in allowing the defendant, during the trial of said cause and after the plaintiff had rested his case, on November 15, 1902, to file his additional plea and compel plaintiff to join issue thereon against the objections made by the plaintiff thereto.

III.

The court erred in allowing the defendant, as a witness in his own behalf, to testify against the objection of the plaintiff, with reference to the last two instalments of the debt which was the subject matter of the suit, as follows, to wit: "I was ordered by the audiencia territorial (highest court) to pay the same (meaning the instalments) to Roig."

IV.

The court erred in allowing the defendant to introduce in evidence against the objection of the plaintiff the certificate of the reg-

istrar of property as to the entries in said registry affecting
17 the title to a farm called "Monte Santo," a mortgage upon which had been given merely as security for the debt which was the subject matter of the suit.

V.

Because the court erred in charging the jury, against the objection and exception of the plaintiff, in the following language, to wit:

"On November 21st, 1893, after one of them (the instalments) had become due, one Belen Sixto was declared his heir. That was by a procedure peculiar to the Spanish courts but nevertheless legal; so, under the law being declared such heir, I say to you as matter of law, that gave her the right to collect the assets of the estate."

VI.

The court erred in charging the jury, against the objection and exception of the plaintiff, in the following language, to wit:

"On February 15, 1894, she having been declared the heir, the entry was made of that fact in the registry (of property). I say to you as a matter of law that that declaration of her heirship was without prejudice to the rights of third parties—and that meant that if any other person showed himself afterwards to be an heir he was entitled to a proper proportion of the estate, but so far as a collection of debts and so far as a proper attention to the assets were concerned and the control of them, she became entitled to attend to that."

VII.

The court arred in charging the jury, against the objection and exception of the plaintiff, in the following language, to wit:

"A suit was brought by Adolfo Sixto on April 4, 1894, against Belen Sixto in order to have his right also as an heir declared. The debtor for this purchase money, Sarria, had no notice of this suit until June 5, 1894, and that was after two payments had been made, Belen Sixto having had the right to collect them."

18 VIII.

The court erred in charging the jury, against the objection and exception of the plaintiff, in the language following, to wit:

"In this contentious suit by Adolfo Sixto against Belen this defendant Sarria was ordered on June 2, 1894, to pay into court whatever money he might be owing. That order was served on Sarria on June 5, 1894, and afterwards that court decided that Sixto, the plaintiff in this suit, was not entitled to attach this money. He obtained an appeal from that judgment, but not from that portion of it that cancelled the annotation made in the registry of deeds of the attachment of that fund. Subsequently, on Nov. 27, 1894, an appeal was allowed in the upper court from that portion of it, but no notice

was given as to Sarria, who was merely a garnishee in the suit, and who had received no notice not to pay over the money until the lower court decided whether he had the right to pay it over. Between the time the court decided the attachment and the time the appeal was allowed in the upper court, Belen Sixto assigned to Roig the third and fourth instalments. I say to you as a matter of law that there was nothing to hinder her from doing that at that time; she had in law the right to do it."

IX.

The court erred in refusing to charge the jury, upon the written request of the plaintiff, in the language or to the effect following, to wit:

"As the *ex parte* decree declaring Belen Sixto the heir of Manuel Sixto expressly saved the rights of third parties, that was notice to the defendant that any payment made to her was made at his peril as against the rights of other true heirs; and, as defendant was not required by any legal authority to pay the first two payments to Belen Sixto, and as the plaintiff is shown in truth to have been an equal heir with Belen Sixto, the plaintiff is entitled to recover one-half of those two payments."

X.

The court erred in refusing to charge the jury, upon the written request of the plaintiff, in the language or to the effect following, to wit:

"As it is shown by the uncontradicted evidence that the judge of the court of first instance of Humacao was entirely without authority or jurisdiction to issue his order on August 31, 1894, directing the registrar to make annotation on his books of said order, said order to the registrar was void and the annotation made by the registrar was void and the former annotation remained in force, which was notice to all the world including this defendant that the plaintiff had an interest in those payments such as might be declared by the court; and the court having afterwards decided that the
19 plaintiff here is entitled to a one-half interest in said estate, the plaintiff is now entitled to recover one-half of the last two payments, with interest."

Wherefore the said Adolfo Sixto, plaintiff in error, prays the honorable, the Supreme Court of the United States, to examine and correct the errors assigned, and for a reversal of the judgment of the district court of the United States for Porto Rico entered in the above-entitled cause.

N. B. K. PETTINGILL.
Attorney for Plaintiff and Plaintiff in Error.

20 ADOLFO SIXTO
vs.
LAUREANO SARRIA. } Assumpsit.

Bill of Exceptions.

Be it remembered that at a term of the United States district court for Porto Rico, held in the city of San Juan on the 13th day of October, A. D. 1902, a cause therein pending, wherein Adolfo Sixto was plaintiff and Laureano Sarria was defendant, came on to be heard before the Honorable William H. Holt, judge of said court, at which time came the said parties by their respective attorneys, N. B. K. Pettingill Esq. for the plaintiff and T. D. Mott Jr. Esq. for the defendant; and thereupon the said issues in manner aforesaid joined between the said parties came on to be tried, and the jurors of the jury aforesaid, whereof mention is within made, being called, likewise came and were sworn to try the said issues upon the merits of said cause in manner aforesaid joined.

And thereupon the plaintiff, to maintain the issues upon his part, being duly sworn as a witness in his own behalf, testified as follows:

My name is Adolfo Sixto. I am the son of Manu*e*l Sixto y Andino, who lived in Vieques and died in November, 1892. I have lived in the island of St. Thomas for twenty years or more up to within a few weeks past. I am now living in San Juan and intend bringing my family here very shortly.

I know the defendant Laureano Sarria and have known him nearly ever since I have lived in St. Thomas. While I was in the employ of the firm of Fechtenberg & Co. of St. Thomas, I went several times to Vieques to buy cattle for them as well as on other business and had business dealings with the defendant. He
21 used to keep a store and I often slept in his store with his clerks and have eaten at his table, and he knew I was the son of Manuel Sixto. My father recognized me and treated me as his son during my visits there, I went to see him at his plantation and it was generally known in Vieques that I was his son. I do not remember any particular occasion when my father spoke of me as his son in the presence of the defendant, nor when the defendant spoke to me of being the son of Manuel Sixto, but I am sure he knew of the relationship and on that account gave me a preference in business dealings.

Vieques is a small island having not more than five or six thousand inhabitants in all. My father also had a natural daughter named Maria Belen Sixto y Melendez who lived in Vieques and, I think, still lives there. I was, of course, acquainted with her and after my father's death I received a letter from her telling me of his death. She also came over to St. Thomas to see me. I have never

received any part of the amount owed by Sarria to the estate of my father.

And further to maintain the issues on his part, plaintiff produced and read in evidence without objection a deed of conveyance from said Manuel Sixto y Andino to the defendant for a certain plantation called "Monte Santo," reserving a mortgage lien for purchase money, a true translation of the material parts of which conveyance from the Spanish into the English language is in words and figures following, to wit:

"In the town and island of Vieques, on the 15th of May, 1892, before me Leandro Lara y Tome, notary of this locality and of the district of Humacao, belonging to the territorial college of San Juan, Porto Rico, residing in this town, there appeared of the first part Manuel Sixto y Andino, sixty-two years of age, widower and property owner; and of the second part Laureano Sarria y Gonzalez, forty-five years of age, married, merchant and property owner; * * *

The appearing parties, with whom I am acquainted, I consider in my judgment to have the necessary legal capacity for the execution of this deed of purchase and sale of country properties; and they therefore state: 1st, Manuel Sixto y Andino, that he owns entirely the following country properties (describing four properties and giving the derivation of title).

Mr. Manuel Sixto sells the farm 'Monte Santo' as described and conveys the same in full ownership to Mr. Laureano Sarria for the sum of sixteen thousand pesos, current money, which sum is
22 to be paid by the purchaser to the seller in four instalments in the following way: Four thousand pesos on the 15th of May, 1893, as first instalment, and four thousand pesos more on each day of the same month of the following years, '94, '95 and '96, which are the three remaining instalments.

The contracting parties agree that the sixteen thousand pesos, current money, total amount of the sale of the farm "Monte Santo," shall draw interest of one hundred and forty pesos per month, current money, which Mr. Sarria shall have to pay to the seller, Mr. Manuel Sixto, in his domicile punctually at the end of each month; which interest shall *de* reduced in the proportion corresponding to that fixed for the sixteen thousand pesos as the said instalments are paid, that is to say, on the payment of the first instalment one-quarter part of the one hundred and forty pesos of interest shall be extinguished; the half of this sum when the payment of the second instalment is effected; three-quarters when the third instalment is paid; and the total sum on the payment of the fourth and last instalment.

Likewise the appearing parties state that they have agreed that the purchaser, Mr. Sarria, is to guarantee the payment of the sixteen thousand pesos, current money, the amount of this sale, as well as the payment of the interest as agreed, with a first mortgage on the total area of the aforesaid farm "Monte Santo."

Mr. Laureano Sarria solemnly accepts this sale in the form proposed by Mr. Manuel Sixto and ratifies the obligation made for the payment of the sixteen thousand pesos, current money, total amount of the farm "Monte Santo," and the interest as stated in the foregoing clauses * * *"

(At the end is the attestation clause, the signatures of the parties and the notary with witnesses, followed by a certificate of registration.)

And thereupon, further to maintain the issues on his part, plaintiff produced as a witness WILLIAM KOERBER who, being duly sworn, testified as follows:

I am a member of the firm of Muellenhoff & Koerber, who carry on, among other things, a banking and commission business which keeps us at all times acquainted with the value of money in circulation in the Island of Porto Rico including Vieques. We were in business during the year 1892 and before, and in that year during the whole of the month of May the value of the Mexican peso was 80 cents in gold, said peso being then the circulating medium in ordinary use.

And thereupon, further to maintain the issues on his part, plaintiff produced as a witness RAMON FALCON who, being duly sworn, testified as follows:

I am secretary of the district court of San Juan, Porto Rico, and as such secretary have in my custody all the records of said court.

I now produce the true and complete record of that court in
23 a cause instituted in the court of first instance of Humacao by the plaintiff Adolfo Sixto to establish his rights as heir of Manuel Sixty y Andino. The district court of which I am secretary is now the custodian of all the records of the old courts of the island.

And thereupon said record was introduced in evidence by the plaintiff without objection, certain parts of which were translated and read to the jury on behalf of plaintiff and other parts referred to without reading. Among other things, there appears from said record the following:

On November 20, 1893, the plaintiff, Adolfo Sixto presented to court of first instance of Humacao his petition of voluntary jurisdiction (expediente de jurisdiccion voluntaria) to be declared heir of Manuel Sixto y Andino, which was received by the court.

On November 21, 1893, Belen Sixto appeared in said court, by her procurador, and filed her opposition to the declaration asked for, stating that she had already in the same court been declared heir of said Manuel Sixto, and requesting that said application be denied in the form presented and said petition or expediente be declared a contentious proceeding (expediente contensioso).

On November 25, 1893, the opposition of Belen Sixto to the proceeding of voluntary jurisdiction was sustained and the suit declared

a "contentious proceeding," "the interested parties and the object of the suit to remain in the same situation as when it was begun."

An appeal was taken from this decision but was afterward abandoned and on April 4, 1894, Adolfo Sixto filed in that court his complaint in the "contentious proceeding," making Belen Sixto a defendant, praying the court to declare him an equal heir with her in the estate of said Manuel Sixto, and further praying that, for the better security of his rights, the court issue an order to the registrar of property requiring him to make a cautionary entry (ano-
24 tacion preventiva) in the registry touching the property affected by the suit, and also an order to Laureano Sarria, the present defendant, requiring him to retain at the disposition of that court whatever sums he was indebted to the estate of said Manuel Sixto.

On June 2, 1894, the court granted plaintiff's prayer for the cautionary notice to the registrar and for the order to be issued to Sarria. The notice to said Sarria was served on June 5, 1894, and a true translation of same with the *the* certificate of service is as follows:

I, Romulo Villahermosa y Borao, judge of the first instance of the city of Humacao and its district, to the municipal judge of Vieques, hereby state:—That in the suit of higher amount begun by Procurador José Calixto Bajandas in the name of Mr. Adolfo Sixto against Doña Belen of the same surname, in order that the latter may recognize him as an intestate heir of Mr. Manuel Sixto, as his natural recognized son, the following, amongst other things, has been decreed:—

Decree.

HUMACAO, *June 2nd*, 1894.

And as regards the supplemental petition (otro si) an order in duplicate be issued to the registrar of property of this district regarding the subject in question; and as regards the second point of said supplemental petition, let Mr. Laureano Sarria be notified in order that he may deposit in this court the amounts which he owes to the estate of Mr. Manuel Sixto Andino within the stipulated instalments, which shall be deposited in the royal treasury until the decision of this matter; therefore, a communication must be sent to the municipal judge at Vieques.

It was ordered and signed by his honor, of which I do certify.

(S'g'd) VILLAHERMOSA.

Before me:
JOSÉ GABL. GONZALEZ.

Therefore, and in order that the above decree may have due effect, I issue you these presents with due authority, notifying Mr. Laureano Sarria as ordered; and this done kindly return same with results.

Given at Humacao on June 4, 1894.

(S'g'd) VILLAHERMOSA.

(Seal of Court.)

(S'g'd) JOSÉ *BABL.* GONZALEZ, *Scrivener.*

Notification.—On June 5th, 1894, I appeared at the residence of Mr. Laureano Sarria and, he being present, I notified him by reading and handing a true copy of that part of the foregoing letter-order which interests him, and after the notification I demanded him as ordered to deposit in the court of first instance of the district the amounts which he owes to the estate of Manuel Sixto Andino as per stipulated instalments and which will be deposited in the royal treasury. He was thus notified and signed the same, of which I hereby certify.

(S'g'd) L. SARRIA.
(S'g'd) JUSTIZ.

The notice to the registrar was also delivered to him on June 5, and his return, dated June 12, 1894, shows the cautionary entries to have been made, of which return a true translation is as follows:

"The annotations ordered in the foregoing judicial orders have been entered at volume 23 of the archive 3rd of the municipality of Vieques at folios 4, 64 turned and 66 turned, properties No. 94, 11 and 112, annotations A, C, and A respectively; and at volume 40 of the archive 6th of the above mentioned municipality, folio 217 turned, property No. 292, annotaction A.

Humacao, June 12/94.

[Seal of Registry.]

(S'g'd) FELICIANO PIÑOL.

On June 6, 1894, notice of the same order of June 2 was also given to the defendant, Belen Sixto.

On June 26, 1894, Belen Sixto answered the complaint and, as a part of said answer, prayed that the cautionary notices entered on the registry be ordered cancelled and the interlocutory decree of June 2nd be vacated and declared null.

On August 30, 1894, the court granted these prayers of the answer by making an order vacating the notice sent to Sarria and to the registrar of property and declaring null the cautionary entries made under the decree of June 2nd, and ordered due notice thereof sent to the registrar. The procurador of plaintiff was notified of this order on the next day, August 31st, and on September 3, 1894, filed his petition for an appeal with both effects from said order; which petition was presented to the judge on the next day, September 4th,

and was allowed by him on September 6, 1894, for one effect only (en un solo efecto), a true translation of said order of allowance being as follows:

"HUMACAO, *September* 6, 1894.

The above petition was presented in due time and form; a copy of same shall be delivered to the other side; and after reviewing article 68 of the mortgage law in force, the appeal interposed on the part of Mr. Adolfo Sixto from the decision dated August 30th last is allowed for one effect only. And in order that he may be able to apply to the most excellent audiencia (higher court) in order to better the appeal, the secretaries shall give him the corresponding certified copy, if he asks for same within the fifth day, indicating what particulars it must contain.

It was ordered and signed by the judge, of which we certify.

(S'g'd) VILLAHERMOSA.
(S'g'd) ANTONIO AGUILAR.
J. MARIANO REYES."

On August 31, 1894, notices of the order of August 30th were issued by the court directed to Sarria and to the registrar of
26 property, which notices were served—on the registrar September 1st and on Sarria September 15th, and the order of cancellation of the cautionary entries was noted on the registrar's books on September 3rd, of the same year.

The appeal allowed as above on September 6, 1894, was duly perfected and on November 17, 1894, the audiencia (supreme court), in considering the application of appellant for enlarging the appeal to both effects, held that such allowance had been wrongfully denied by the court below and ordered that said appeal be considered as having been taken for both effects.

Thereafter on December 22nd, 1894, plaintiff applied to the audiencia for a further notification to said Sarria regarding the validity of his obligation under the decree of June 2nd, which application was granted and the court of first instance ordered to transmit the same. In pursuance of this, said last mentioned court proceeded to effectuate the same by sending a copy thereof to the municipal judge of Vieques for service, a true translation of which with the service of the same is as follows:

"To the municipal judge of Vieques:

The procurador, José Calixto Bajandas, has presented in this court a communication from the office of the secretary of civil bench of the audiencia territorial, the contents of which and the decision rendered thereon are as follows:

Communication.—In the record number 58 pertaining to the suit of higher amount carried on in this court by Mr. Adolfo Sixto against Doña Belen Sixto y Melendez on the subject that he be declared intestate heir of Mr. Manuel Sixto y Andino, he being his natural recognized son, and to a petition presented by the representative of

Mr. Adolfo Sixto, the court has decreed as follows: 'As to the principal part of the above petition, enter the appearance of the procurador, José Palacios, in the name of whom he appears, and let an abstract of the suit be made. As to the supplementary petition, that which was ordered in the decree appealed from regarding Mr. Laureano Sarria is hereby set aside, leaving in force the requisition ordered and directed to said Sarria on June 2nd by the judge of first instance, until the resolution of the pending appeal. Wherefore have an order issued and directed to the said judge inserting therein what may be pertinent from this decree in order that he may notify the said Mr. Sarria, making the return as soon as possible. And as regards that part of the petition concerning the cancellation of the cautionary entry, the same is out of place.' It was thus decided by the judges of the court and, with the scroll
27 of the presiding judge, I hereby certify.

(S'g'd) MARIANO PEREZ. [SCROLL.]

I hereby notify you of the above by order of the court for its execution, expecting that you will remit me the corresponding certificate.

May God preserve your life many years.

Porto Rico, January 5, 1895.

MARIANO PEREZ.

To the judge of the first instance of Humacao:

Order.

HUMACAO, *January* 7, 1895.

The above order from the office of the secretary of civil bench of the audiencia territorial was received; have the said superior order complied with, recorded and executed; and have a communication sent to the municipal judge of Vieques embodying the said order and this decree for the notification of Mr. Laureano Sarria referred to. It was decreed and signed by the substitute municipal judge, acting as judge of the first instance, before us—of which we hereby certify.

(S'g'd) LUIS G. TORO.
(S'g'd) ANTONIO AGUILAR.
(S'g'd) J. MARIANO REYES.

I hereby communicate the above to you in order that you may give notice of the contents thereof to Mr. Laureano Sarria, returning these presents with the service thereon.

May God keep your life many years.

Humacao, January 7, 1895.

(S'g'd) LUIS G. TORO. [SEAL OF COURT.]

Notification to Mr. Laureano Sarria.

On the 8th day of January, 1895, I appeared at the residence of Mr. Laureano Sarria and, he being present, I notified him of the full contents of the aforesaid superior order, reading same to him and delivering to him a true copy thereof. He signed these presents of which I hereby certify.

(S'g'd) L. SARRIA.
(S'g'd) JUSTIZ.

Appearance of Mr. Laureano Sarria.

On the 8th day of January, '95, here appeared Mr. Laureano Sarria and stated that, as can be seen by the above return, he has been notified of the order made by superior authority, but for the reason of not understanding its contents or knowing what to expect he respectfully requests that a clear and detailed specification be given him as to what he is to comply with. He so stated and signed together with the judge, of which I hereby certify.

(S'g'd) L. SARRIA.
(S'g'd) C. S. BLANCO.
(S'g'd) FR'CO JUSTIZ."

Upon the transmission of this notification and return thereon to the audiencia, plaintiff requested from that court a further order making clear to Mr. Sarria that which he did not understand and, in compliance with that request, the audiencia ordered an explanatory communication to be sent, a true translation of which with the accompanying communication of the court of first instance is as follows:

"To the municipal judge of Vieques:

This court has received a communication from the office of the secretary of the civil bench of the audiencia territorial, the contents of which and of the decision rendered thereon are as follows:

Communication.—In the records of the suit of higher amount carried on in this court by Mr. Adolfo Sixto against Doña Belen Sixto on the subject that he be recognized as intestate heir of his father, Mr. Manuel Sixto a petition has been presented by the procurador Palacios as attorney in fact of the former, which first supplementary petition and the decree rendered thereon are as follows:

28

'*First Supplementary Petition.*—I hereby present, duly returned, the order which was issued to Humacao to notify Mr. Laureano Sarria of Vieques of the contents of the decree of December 22nd. As it appears by these proceedings, Mr. Sarria asks that the order be made clear to him so as to know the details exactly of what he must comply with. In requisitions of such importance as

that it is well that Mr. Sarria be well informed as to what he is ordered to do. I request the court to direct that the said proceedings be added to the records and that with the same a new explanatory order be directed to Mr. Laureano Sarria, informing him that said requisition means the ratification of the one previously directed to him by the court in order that the sums which he owed from that time to Mr. Manuel Sixto should not be delivered by him except to the court in order to deposit same in the royal treasury. Justice.'

Order.

PORTO RICO, *January* 25, 1895.

As to the principal part of the foregoing petition, have the records made up as prayed for. Regarding the first supplementary petition, be it done as requested; have the necessary order issued to the judge with the necessary transcription. As to the second supplementary petition, it is declared that this court is open to Doña Belen Sixto in which the subsequent proceedings and notifications to be made shall be considered as well as the record which is also ordered. It was thus declared by the judges and rubricated by the presiding judge, of which I hereby certify.

Before me, the secretary,

[RUBRIC.] (S'g'd) MARIANO PEREZ.

I notify you of the above by order of the court for its execution, expecting due acknowledgment thereof, attaching hereto also the proceedings referred to above wherein appears the requisition made upon Mr. Sarria. May God keep your life many years.

Porto Rico, January 29, 1895.

MARIANO PEREZ.

Order.

HUMACAO, *February* 5, 1895.

The foregoing order from the office of the secretary of the civil bench of the audiencia territorial with the proceedings referred to therein was duly received. Have the said superior order complied with, recorded and executed; and together with that order as well as this have a communication sent to the municipal judge of Vieques for the notification of Mr. Laureano Sarria.

It was decreed and signed by the substitute municipal judge, acting as judge of first instance, before us, of which we hereby certify.

(S'g'd) LUIS G. TORO.
(S'g'd) ANTONIO AGUILAR.
(S'g'd) J. MARIANO REYES.

I hereby communicate to you the above in order that you may give notice of the contents thereof to Mr. Laureano Sarria, explain-

ing to him that the requisition referred to in the attached communication is a ratification of that one made to him on the 2nd of June, until the pending appeal is decided, and making due return hereon.

God preserve your life many years.

Humacao, February 5, 1895.

(S'g'd) LUIS G. TORO.

Notification to Mr. Laureano Sarria.

On the 8th of February, 1895, I appeared at the residence of Mr. Laureano Sarria and, he being present, I notified him of the full contents of the aforesaid superior order, explaining to him that the requisition referred to in the attached communication is a ratification of the one made on him on the 2nd of June, until the pending appeal is decided. He thus informed himself and signed, of which I hereby certify.

(S'g'd) L. SARRIA.

(S'g'd) JUSTIZ.

29 On November 29, 1895, the audiencia (supreme court) rendered its decision on the merits of the appeal, reversing and declaring null the order of August 30, 1894, and declaring valid and final the order of June 2, 1894, a true translation of which decision is as follows:

"PORTO RICO, *November* 29, 1895.

It appears that procurador José C. Bajandas in the name and representation of Mr. Adolfo Sixto, and with sufficient power, applied to the court of first instance of Humacao requesting that the latter be declared an heir to his natural father, Mr. Manuel Sixto, whose will made by cedulas had been declared null and void, accompanying said application with the power of attorney, the certificate of the recorded death of said Manuel Sixto, as well as another certificate as to the acknowledgment in favor of the applying party, and offering public information in order to justify the right which he claims. And, the record having been commenced, the same was declared contentious, as Doña Belen Sixto, who had previously been declared heir of the deceased Sixto, made opposition to said application.

It appears that in this state of affairs Adolfo Sixto commenced a suit of higher amount based on the facts and foundations of law as per his petition of the 4th of April, 1894, requesting in a supplemental petition that an order be issued to the registrar of property for the cautionary annotation of the suit and that Mr. Laureano Sarria be notified, as he holds moneys belonging to the estate of Mr. Manuel Sixto, in order that he should retain same in his possession until he should be judically ordered to whom he should deliver same; and, the suit having been admitted, by decree of June 2nd,

1894, it was ordered that the notification requested be granted and Mr. Sarria was instructed to pay into court the above mentioned amounts with the view of depositing same in the royal treasury until the resolution of the matter.

It appears that, the cautionary entry having been made as well as the notification which was ordered, in this state of the case and after due summons on the sixth of the same month the procurador, Mr. Tomas Carreras, appeared and answered the suit in the name of Doña Belen Sixto under the facts and foundations of the petition of July 26th of said year, presented on the same day, requesting in a supplemental petition that the cautionary entry be declared without effect, basing the petition on the lack of property of the plaintiff, also that no order was given for the attachment and disposal of the property and the plaintiff not having promised to indemnify the irreparable damages which the defendant might suffer in case the decision should be in her favor; which petition was declared out of place by decree of July 28th.

It appears that against this decree the representative of Doña Belen filed a petition for re-hearing, asking that the suit be brought back to its original state, on the 18th of August following; and after the request was notified to the other side who requested that it be declared out of place because, amongst other reasons, the defendant had allowed the legal time to elapse within which she could have presented such petition, as she could have requested when she answered the suit that said annotation be declared without effect, the petition filed was, by order of August 30th, declared to be received in due time, and the above mentioned annotation was annulled; and therefore the judicial order of June 2nd was reformed not only as regards said annotation, which was declared null and void, but also as regards the notification to Mr. Laureano Sarria, regarding which no asking was made.

It appears that from this decision plaintiff filed an appeal, protesting against the execution of the order because it was not in full force and effect, and, it having been admitted for one effect only, a certified copy was issued and sent to this higher court, Mr. José Palacios appearing therein as procurador in the name of the appealing party for the bettering of said appeal, and it having been admitted and for both effects of the case, the original records were brought up and, at the request of the appealing party, the notification to Mr. Laureano Sarria was declared in force and, the formalities of law having been carried out, a day was fixed for trial, which took place with the appearance of lawyer Manuel F. Rossy and procurador José Palacios, the first named informing the court what he thought pertinent to the rights of his client.

Considering that the notification of the suit having been made on the 6th of June to the defendant and having considered her as a party to the suit on the 16th of the same month, she did not plead against the decision until the 26th of July and therefore allowed the five days fixed by article 375 of the Law of Civil Procedure to elapse without asking that the case be carried back to its original state in

so far as the cautionary annotation and the notification to Sarria was concerned.

Considering that therefore the judge should not have accepted the petition for re-hearing as the decision was final and in force and effect and, as a result, the acceptance is null and void in law for that reason.

Considering that not only said illegality was committed but also that a petition for the reconsideration of a reconsideration was admitted and acted upon, as no other name can be given to the petitions of the defendant.

Considering, furthermore, that the judge of his own volition by his order of August 30th reformed his decision of June 2nd in that part which ordered the notification to Sarria, and which had not been asked for—and therefore this shows another illegality.

After reviewing the above cited articles the decree appealed from is hereby revoked, and therefore the decision of June 2nd is declared in full force and effect whereby the cautionary annotation was ordered as well as the notification to Sarria, without making any special decision as to costs. Have the records sent back to the judge with a certified copy of this opinion; said judge, Romulo Villahermosa, being careful to proceed in future in accordance with the law."

31 This decision was transmitted to the court below January 11, 1896, and on March 23, 1896, the procurador of plaintiff requested the court to notify both the registrar of property and Mr. Sarria that the audiencia had declared the order of June 2, 1894, still in full force and effect. Notice was accordingly issued to Sarria on April 10th and served on him May 4th, 1896; to which a reply was made by said Sarria on the same day, a true translation of which reply is as follows:

"On May 4, '96, appeared Mr. Laureano Sarria y Gonzalez and stated: that, having received notice that the instalment of the mortgage has been transferred to Mr. Antonio Roig, who has recorded said transfer in the registry of property, and supposing that he will proceed to collect the same judicially as he did the previous instalment, he is unable to accept the notification and he will appear before the audiencia in the premises. He thus stated and signed with me, of which I hereby certify.

(S'g'd) L. SARRIA.
(S'g'd) JUSTIZ."

Notice was also issued to the registrar on April 10th and served on him April 11, 1896, to which a reply was made by him on April 13, 1896, a true translation of which reply is as follows:

"The above judicial order is not complied with for the following reasons, viz:

1st. Because subsequent to the cancellation of the annotations, which are directed should remain in force, the property as well as

the encumbrance thereon was transferred to third parties,—this being an irremediable defect. See art. 20 Mortgage Law.

2nd. Because in the present mortgage law in force there is no provision regarding the form of carrying into effect the transaction ordered above,—this being a remediable defect.

I keep on file a copy of this order, attaching same to the records of its class numbered 15.

At Humacao on the 13th of April, 1896

(S'g'd) FELICIANO PIÑOL,

[SEAL.] *Registrar of Property.*

On May 6, 1896, plaintiff asked for a further order to the registrar compelling the entry before ordered, which request was denied by order of May 16, 1896. On May 22 plaintiff requested a reconsideration of this order, which was denied on June 1, 1896.

32 Thereafter proofs were taken and the cause was submitted in the court below upon its merits, and a final decree in favor of the defendant and against the claim of the plaintiff, Adolfo Sixto, was rendered on December 15, 1896, from which plaintiff entered his appeal to the audiencia in due time on December 22, 1896. This appeal was admitted for both effects by an order dated the same day last aforesaid.

On the same day there was received in said court of first instance the decree of the audiencia, dated November 28, 1896, declaring the appeal from the orders of May 16th and June 1st, 1896, operative for both effects. On February 15, 1897, the audiencia declared the consolidation of all the appeals (accumulacion de apelaciones), ordering the suspension of further proceedings until their final decision thereon.

On September 29, 1899, a final decision upon the merits of the appeals was rendered by the appellate court (the name of which had been changed by military orders issued after the change to American sovereignty), a true translation of which decision is as follows:

"In the city of San Juan, Porto Rico, on the 29th day of September, 1899.—After reviewing the suit of higher amount brought in the now abolished court of first instance at Humacao by Mr. Adolfo Francisco Sixto, a merchant and resident of St. Thomas, represented by his procurafor, Jose C. Bajandas, and his counsel, Lawyer Manuel F. Rossy, against Doña Belen Sixto, of domestic occupation, who is herein represented by her procurador, Tomas Carreras, and her counsel, Lawyer Isidoro Soto Nusa, concerning recognition of natural affiliation and declaration of intestate heirship of the deceased, Mr. Manuel Sixto, which is pending in this court by reason of consolidated appeals brought by Mr. Adolfo Sixto against the order of June 1, 1896, which had denied to him a re-hearing upon the decision of the 16th of May previous, and the judgment of the 15th of December of the same year, which declared without merit the suit brought by Sixto, with costs against him;—accepting the foundation of facts of the said judgment, and

It appearing, that both parties were summoned by the lower court to appear and, at the request of Mr. Adolfo Sixto's representative, in this second instance an order was made under date of February 15, 1897, allowing the appeals consolidated as against the order and judgment mentioned; and the appealing party only being present, it was declared that the other party was in default and that both be summoned for final judgment, the public hearing taking place with the attendance of the lawyer of Mr. Adolfo Sixto; and in the carrying on of the proceeding the legal formalities being observed; the associate judge, Felipe Cuchi Arnau rendered the opinion of the court:—

Accepting the original findings from the first to the fifth
33 inclusive in the judgment appealed from, and further,

Considering (finding), that if the copy of the baptismal paper of Mr. Adolfo Sixto issued by the rector of the Cathedral Church of St. Thomas, duly authenticated by the consul of Spain in said island, should not be considered, under the decisions of the supreme court of Spain of July 23, 1858, June 28, 1864, and November 29, 1886, sufficient proof to establish that Mr. Adolfo Sixto is a legitimate son of Mr. Manuel Sixto and Doña Mathilde Batell, although there may be established by it that foundation of written proof corroborated by the seven witnesses whose names and testimony are recited in the fifteenth finding of facts; it is sufficient, in the judgment of this court, for the recognition of Mr. Adolfo Sixto as a natural son of Mr. Manuel of the same surname and of Doña Matilde Batell, under the decisions of the same supreme court of Spain of October 8, 1853, June 13, 1862, October 9, 1865, December 1, 1881, July 10, and September 10, 1886, and March 26, 1889;

Considering, that, the filiation of Mr. Adolfo Sixto as son of Mr. Manuel Sixto and Doñe Matilda Batell having been established, the law presumes that said parties were in a position or attitude to get married when they procreated and gave birth to their son, there being no proof to the contrary, according to the decision of the said supreme court of Spain of October 11, 1882 and May 11, 1887;

Considering, that, if the fact of the birth of Mr. Adolfo Sixto took place on St. Thomas before the promulgation in Porto Rico of the present civil code, the death of Mr. Manuel Sixto took place after the promulgation of said civil code; therefore the right of Mr. Adolfo Sixto to inherit from him must be regulated in accordance with article 939 of said code, as set forth in transitory rule 11 for the application of the same;

Considering, that, there being no legitimate ancestors or descendants of the deceased Manuel Sixto, his intestate property must be divided in equal parts between his two natural children, Belen Sixto Melendez and Adolfo Sixto Batell, as prescribed by said article 939 of the present Civil Code;

Considering, that in regard to the personality of Mr. Adolfo Sixto, he being the son of a Spanish father though born in Danish territory, this fact gives him the character of a Spanish subject before the courts governed by Spanish legislation, until something to the

contrary has been proven by some of the means of proof allowed by law;

Considering, that the recognition of the right which the appealing party has to enjoy the half of said inheritance carries with it the revocation of the order of June 1, 1896, which denied the petition for re-hearing of the decision of May 16 previous—which decision hindered the prior security of appellant's rights;

After having reviewed the legal provisions cited and article 371 of the Law of Civil Procedure, we decide

That we must reverse the order of June 1, 1896, and the judgment of December 15, 1896, and in their stead we declare that Mr. Adolfo Sixto, as natural son of Mr. Manuel Sixto, has the right to the intestate inheritance from his deceased father together with his sister, the defendant; and we impose upon her the costs of both instances.

We pronounce, order and sign the same.

(S'g'd) JUAN R. RAMOS.
ANGEL ACOSTA.
FELIPE CUCHI.

And it further appeared from said record that no appeal or other proceedings had been taken to vacate said last recited decree but that the same is still in force.

34 And further counsel for plaintiff read to the jury a letter from the aforesaid Belen Sixto to plaintiff, which formed a part of the record aforesaid, which letter truly translated is as follows:

VIEQUES, *November* 30, 1892.

Mr. Adolfo Sixto.

MY DEAR BROTHER: I address you this letter to let you know the death of our beloved father, who died on the 24th instant. His death was somewhat sudden, yet he did not forget us in his will as I have been told by the notary of this town. We are heirs to $760 and I request you to come over as soon as possible, as the notary told me that your presence was necessary in order to collect our money.

Your affectionate sister,

(S'g'd) BELEN SIXTO.

And thereupon plaintiff rested his case.

Whereupon the defendant, to maintain the issues on his part produced and offered in evidence another copy of the deed of conveyance from said Manuel Sixto to defendant for the purpose of showing the date on which the same was recorded in the registry of property and, as said deed already appears in evidence, it is agreed by counsel for the respective parties that the same was duly registered in the registry on June 13, 1892.

And the defendant, further to maintain the issues on his part, produced and read in evidence without objection a certified copy of the decree of the court of first instance of Humacao whereby

Belen Sixto was declared an heir of her natural father, Manuel Sixto, a true translation of which decree is as follows:

"In the town of Humacao, on the 21st day of November, 1893, the judge of first instance of this town and its district, Don Romulo Villahermosa y Borao, in view of the records,

(1.) It appears, that Don Manuel Sixto y Andino, native of Aguadilla, widower, with residence in the island of Vieques, died in said last mentioned place on the 26th day of November of the year last past, without having executed a will in legal form, for, although there were presented three cedulas with a petition that they be elevated to a public document, by final sentence it was declared that they could not be held as a testament of said party;

(2.) It appears, that said Don Manuel Sixto y Andino left no legitimate descendants nor ascendants and only one recognized natural daughter, named Doña Belen Sixto y Melendez, who has survived him;

35 (3.) It appears, that the aforesaid natural daughter, legally recognized, applied to this court under date of the 18th of the current month, making known the death of her natural father without a will and that she was the only legitimate heir, presenting the sacremental documents and those of the civil registry, and also credentials which prove her parentage with the deceased and the death of this last party, and she thereupon concludes by petitioning that she be declared heir *ab intestato* of the same;

(4.) It appears, that with proper summons of the district attorney there was received the proofs offered upon the matters aforesaid and there was communicated to him the record, and he has rendered his opinion in favor of the said declaration;

(1.) Considering, that the intestate succession belongs to the natural children, recognized, in default of legitimate descendants and ascendants, according to art. 939 of the Civil Code;

(2.) Considering, that in accordance with this legal disposition the estate of Don Manuel Sixto y Andino belongs to his natural recognized daughter, Doña Belen Sixto y Melendez, because he died without testamentary disposition, and it is proper therefore to make in favor of the same the declaration of heir *ab intestato* which she has petitioned.

Having in view the provisions of articles 978–80 of the Law of Civil Procedure; 939 and par. 1 of 912 of the Code, his honor, before me, the escribano, said: That he should declare and does declare heir *ab intestato* of Don Manuel Sixto y Andino his recognized natural daughter, Doña Belen Sixto y Melendez, without prejudice to third parties, ordering that there be given her a certificate of this declaration so that she may make use of her right. And by this, his decree, the said judge thus ordered, decreed and signed, to which I certify.

(Signed) ROMULO VILLAHERMOSA.

Before me,

CARMELO MARTINEZ.

And further to maintain the issues on his part the defendant produced another order in the same proceeding as the last, which was read in evidence without objection, a true translation of which is as follows:

"HUMACAO, *November* 25, 1893.

The actuary having informed the court day before yesterday, and the foregoing being presented with the accompanying documents, which the actuary shall rubricate, let it be added to its antecedents, of which also the court has been informed, and in conformity with the provisions of art. 1001 of the Law of Civil Procedure it is now ordered that there be delivered to the heir, Doña Belen Sixto y Melendez, all of the properties, books and papers which formed the body of the intestate estate of the deceased, Don Manu*e*l Sixto y Andino, and the administrator named, Don Rudolfo Diaz shall render her an accounting and the judicial intervention shall now be terminated, which said judicial intervention was had at the instance of said Doña Belen, and there shall be made the opportune delivery by the actuary of the amounts which are deposited in his keeping and which have been paid by Don Laureano Sarria on account of the interest.

To the supplementary clause that it be done as requested, the proper communication being made to the treasurer-general and delivery being made to the interested heir, with the corresponding receipt, and upon the receipt for the proceedings in these records which shall be therein extended. The judge so ordered and signed, to which I certify.

(S'g'd) VILLAHERMOSA.

Before me,

CARMELO MARTINEZ.

36 Whereupon, it being the second day of said trial and the 15th day of November, A. D. 1903, the defendant by his attorney tendered and asked leave to file an additional plea in said cause, to the filing and consideration of which plaintiff by his attorney objected on the grounds following, to wit: First, that said offer came too late after plaintiff had introduced all his evidence and rested his case; second, that defendant showed no reason or excuse why said plea had not been filed within the time allowed therefor by the rules and practice of the court nor any good cause appealing to the discretion of the court to allow the filing of the same; and, third, that said plea was defective, insufficient and demurrable for the same reasons set forth in the demurrer theretofore filed by plaintiff to the original plea of the defendant. But the said judge did then and there overrule said objections and allow said plea to be filed upon the conditions set forth in the corresponding record entry of this court, to which ruling the plaintiff by his attorney did then and there except.

37 And thereupon, further to maintain the issues on his part, the defendant was called and sworn as a witness in his own behalf and, after being so sworn, testified as follows:

My name is Laureano Sarria y Gonzalez. I live in Vieques and have lived there for many years. In 1892 I bought the estate called "Monte Santo" from Manuel Sixto, giving him a mortgage lien for sixteen thousand dollars of the then current money payable in instalments according to the terms of the deed already in evidence. I paid the interest monthly to Manuel Sixto up to the time of his death. The first instalment fell due in May, 1893, and I paid it to the court of first instance of Humacao according to its order, for which I obtained a receipt from the court. This is a copy of the receipt which is handed me.

Whereupon defendant introduced in evidence without objection said receipt, of which a true translation is as follows:

"Don Laureano Sarria y Gonzalez, resident and merchant of the island of Vieques, has deposited upon the table of this court the sum of four thousand pesos, current money, the amount of the first instalment due on the fifteenth of May last, of a certain mortgage credit which he has constituted in favor of Don Manuel Sixto y Andino upon the farm called 'Monte Santo,' situated in the barrio 'La Florida,' municipal district of Vieques. He has also deposited the sum of eight hundred twenty-two and fifty-two hundredths pesos of the same kind of money for interest due up to the last day of May last past, at the rate of one hundred forty pesos per month up to the fifteenth of said May, and at the rate of one hundred five pesos per month for the fifteenth to the last day of said month. He at the same time presented a receipt for one hundred forty pesos, signed by the aforesaid Don Manuel Sixto y Andino, dated the 26th day of November of the year last past, for the monthly sum due on the 30th of the said November; and the aforesaid deposit he makes in compliance with the order of this court of first instance, dated the 15th of the current month, and which decree was issued in the preliminary proceedings prosecuted by Doña Belen Sixto y Melendez as recognized natural daughter of the said Sixto y Andino touching and respecting the possession of the property left upon the death of the aforesaid Manuel Sixto y Andino, and a petition touching an allowance for necessaries; the said Mr. Sarria as well as the farm mortgaged thus being absolved of all responsibility touching and respecting the instalment and interest thus paid, he having made the deposit in the form of a check on the Spanish Bank of Porto Rico, payable to bearer, for the sum of forty-five hundred pesos, and for the sum of three hundred twenty-two and fifty-two hundredths in a bill or currency of the same bank for the sum of two hundred forty pesos, and the difference he paid in in

38 Mexican pesos.

Humacao, June 22, 1893.

(S'g'd) CARMELO MARTINEZ, *Secretary.*

(Countersigned)
VILLAHERMOSA. [SEAL OF COURT.]

(Witness continues:)

The second instalment, which was to fall due in May, 1894, I paid to Belen Sixto about the first of April, 1894, which payment was solemnized by a notarial act whereby the property mortgaged might be relieved from the lien of the two first instalments. I think this was made before the notary Leandro Lara. The paper now presented to me is a copy of this notarial act.

Whereupon said instrument was introduced in evidence by the defendant without objection, a true translation of the material parts of which is as follows:

"No. 28.

Partial Cancellation of Mortgage.

In the town and island of Vieques on the 4th day of April, 1894, before me, Don Leandro Lara Tomé, notary of this locality, district of Humacao, and of the illustrious territorial college of this province of San Juan de Puerto Rico, resident of this town, appear: on the one part, Doña Belen Sixto y Melendez, thirty years of age, single, pursuing the vocations peculiar to her sex, and resident of this town; and on the other part, Don Laureano Sarria y Gonzalez, forty-six years of age, married, merchant, also of this locality, * * *

I consider that the appearing parties, whom I know, have in my judgment the legal capacity necessary for the execution of this instrument of partial cancellation of a mortgage, and to that end, they say:

(1.) Doña Belen Sixto y Melendez says, that she takes part in this act in the capacity of "heir *ab intestato*" of her deceased natural father, Don Manuel Sixto y Andino, which she proves by a certificate of decree of declaration of heirship which she shows and is hereinafter inserted, and which is as follows:

(Here follows a copy of the decree of the court of first instance of Humacao, dated Nov. 21, 1893, which is already in evidence, supplemented by a certificate showing the same was inscribed in the registry of property on Feb'y 13, 1894.)

She also exhibits a certificate of the registrar of property of this district in which various properties are set forth, which on account of her title as such heir Doña Belen Sixto y Andino received, and among them appeared a mortgage credit described in words and figures as follows, to wit: (Here follows a description of the farm 'Monte Santo' together with a recital of the proceedings by which Belen Sixto had been declared heir of said Manuel Sixto and also a statement as follows: 'In virtue of this there was registered in favor of Doña Belen Sixto y Melendez the credit which for the sum of sixteen thousand pesos Don Manuel Sixto y Andino had upon the property of this number, without prejudice of third parties, and which she acquired by title of intestate inheritance.')

(2.) The form of payment of the aforesaid mortgage credit,
39 as appears from the document of its execution, is as follows: (Here follows the stipulation for payment as contained in the deed.)

(3.) That the instalment due on May 15, 1893, *i. e.* the first instalment, amounting, with part of the interest due and not paid, to the sum of 4,822.50 pesos was delivered by Don Laureano Sarria y Gonzalez upon the table of the court of first instance of this district on June 22nd of the aforesaid year, because at that time the inheritance was still inchoate as at that time there had not yet been made the declaration of heirship *ab intestato* of Don Manuel Sixto in favor of the executing party, Doña Belen Sixto since this was done on Nov. 21, of the aforesaid year—all of which appears from the certificate of the corresponding decree which has been above literally inserted. * * * Of all of which the Hon. Romulo Villahermosa y Borao, judge of the first instance of Humacao, in compliance with what is disposed in the decree dated June 15, 1893, in respect to actions pending in said court, executed a receipt and partial cancellation of mortgage for the aforesaid sum in favor of Don Laureano Sarria, dated June 23, 1893, before the notary Don Marcelino Estevanes of the aforesaid town of Humacao.

(4.) Posterior to the declaration of heirship *ab intestato* decreed by said court, it was ordered by said court that delivery be made to Doña Belen Sixto, as such heir of her natural father, Don Manuel Sixto, of the said sum of 4,822.50 pesos, which was then on deposit in the royal treasury by order of Judge Villahermosa, and she, the interested party, having taken the same in charge because she received the aforesaid sum to her satisfaction, is willing to partially cancel the corresponding mortgage.

(5.) That she has also agreed with Don Laureano Sarria that he shall pay her the second installment, about to fall due, with the corresponding interest up to the 15th of May next, which is the date upon which it falls due, and therefore they proceed to execute the present instrument of partial cancellation for the total sum of said two instalments with the interest, so that it may be done in the registry of property in the proper legal form as the obligation for further guaranty is found recorded in the same—in the form and manner which shall be set forth in the stipulations following to wit: (here follows the formal acknowledgment of the receipt by Doña Belen Sixto of the amount of the two instalments with interest, stating in detail the manner of the payments), all of which she affirms and ratifies after I, the notary, had warned her that by virtue of the aforesaid admission the farm "Monte Santo" which is found mortgaged, is freed of all responsibility on account of the aforesaid sums and the-r interest etc.

Second. The mortgage right which was imposed upon the farm "Monte Santo" as security for the payment of the first two instalments, amounting to the sum of 8,000 pesos with interest is now extinguished, and therefore the mortgage * * * is partially cancelled and the said mortgage is by the present instrument reduced

to the sum of 8,000 pesos with the corresponding interest, according to what appears etc.

* * * * * * *

(The instrument is signed by Belen Sixto and Sarria and the witnesses and has a certificate showing its record in the registry of property on April 5, 1894.)

(Witness continues)

40 The third instalment, together with some interest, I paid into the Humacao court, as there was then a suit pending between Adolfo Sixto and Belen Sixto. However, the latter had transferred the last two instalments to Antonio Roig and Roig sued me to foreclose the third instalment. I was ordered by the audiencia territorial (highest court) to pay the same to Roig.

The question to which the last preceding sentence was an answer was objected to by the attorney for the plaintiff on the ground that the subject inquired about was immaterial and irrelevant to the issues made in the case now before the court, and on the further ground that it was not shown that the plaintiff was a party to any such suit and, if not a party, he could not be bound or his rights affected by any decree or order made therein, which objection was overruled by the court and the answer of the witness allowed to be given to the jury, to which ruling of the court plaintiff, by his attorney, did then and there except.

After this order was entered I petitioned the Humacao court to permit me to withdraw the amount of the third instalment and interest paid into said court, which was granted by an order dated April 25th, 1896, a copy of which is attached to the record of the Humacao court in the suit of the present plaintiff against Belen Sixto, already introduced in evidence.

The fourth and last instalment I also paid to Roig as he appeared to be the record owner of the mortgage and in the suit to foreclose it was found by the court that I owed him the amounts of the last two instalments. This last payment was made by notarial act.

I have thus paid off this mortgage and my property stands today upon the record clear and free from all burdens.

Whereupon said defendant introduced in evidence without objection a copy of the notarial act last above referred to, a true
41 translation of the material parts of which is as follows:

"In the city of Humacao, on the 16th day of May, 1896, before me, Don Marcelino Estevenez Nauclares, notary etc., appear Don Antonio Roig y Torrellas, merchnat of this locality, and Don Laureano Sarria Gonzalez resident of Vieques. They manifest that they are both in the full enjoyment of their civil rights and free use and disposition of their properties, on account of which I consider that in my judgment they have the legal capacity for the execution of this instrument of total cancellation of mortgage, and in consequence thereof they freely say:

1st. (Describing the terms of the original mortgage.)

2nd. That Doña Belen Sixto, as heir *ab intestato* of D'n Manuel Sixto declared such by decree of the court of first instance of this district dated Nov. 21st, 1893, ceded to the appearing party, Señor Roig, the mortgage credit mentioned in the preceding clause to the extent of the last two instalments of four thousand pesos each, due on the 15th of Ma- of the years 1895 and 1896 with their interests, as results from the document of cession, No. 203, executed before me on Sept. 11, 1894, a first copy of which was duly recorded in the aforesaid registry etc.

3rd. That said mortgage has already been cancelled in regard to the first two instalments and the debtor, Señor Sarria, having duly satisfied unto the creditor, Señor Roig, the amount of the capital and interest of the last two instalments, of which said instalments this last named gentleman is at present sole owner by virtue of the cession above mentioned,—it is proper to proceed to cancel said mortgage with regard to the last two instalments, as, in fact, they do by means of this instrument, which they execute under the clauses following, to wit:

First. Señor Antonio Roig y Torrellas, as such assignee and actual owner of the mortgage credit set forth in clauses first and second in regard to the last two instalments of said mortgage of four thousand pesos each, due May 15th of the years 1895 and 1896, in this act and in my presence and that of the witnesses confesses having received to his satisfaction before this time and from the hands of the actual owner of the mortgaged property and debtor, Don Laureano Sarria, the eight thousand pesos, which is the amount of the capital corresponding to the aforesaid last two instalments, besides the interest agreed upon and due, in consideration of which sums and facts he executes in favor of Señor Sarria the most effectual letter of payment by means of this document.

Second. (Releasing the mortgage lien as to said last two instalments.)

* * * * * * *

I, the notary, have made to the contracting parties the following warnings: First that the receipt of the capital and interest of the aforesaid debt being confessed, as it is, the property which was incumbered remains free from all responsibility on account of the said debt, even though it be proven afterwards that the delivery of said capital and interest was not true in all or in part." * * *

Signed by the parties, witnesses and notary, and certified to have been registered in the registry of property on May 26, 1896.

(Witness continues:)

I do not know Adolfo Sixto. I never saw him to my knowledge until I saw him in court here. I knew Manuel Sixto since the year 1869 in Vieques. I never heard that Manuel Sixto had a
42 natural son, although it was a matter of general knowledge in Vieques that he had a natural daughter named Belen Sixto. I know the firm of Fechtenberg & Co. of St. Thomas and have had business dealings with them during the period between

the years 1872 and 1890. I knew several of the employees of said firm but never knew Adolfo Sixto and am sure that I never saw him when I called at the store or office of said firm. I never saw Adolfo Sixto in Vieques, have never conversed with him and he has never been at my house. It could not make any difference to me to whom I paid the mortgage debt so long as I had to pay it. I have since paid this money to the last penny to the persons whom the courts not only told me were the proper parties, but even ordered me to pay.

And thereafter, further to sustain the issues on his part the defendant offered in evidence a certificate of the registrar of property for the district of Humacao as to the entries in said registry affecting the title to said farm "Monte Santo," to which document the plaintiff, by his attorney, objected on the ground that said document was only secondary evidence of the matters therein certified, that it did not contain the full contents of the instruments registered but only a memorandum or extract of what in the registrar's opinion was the legal purport of such instruments, and that the instruments so recorded themselves, or proper copies thereof, are the best evidence of the transactions. But the judge did then and there overrule said objections and did allow said document to be introduced and read in evidence, to which ruling of the court, the plaintiff by his attorney did then and there except.

A true translation of the substance and material parts of said instrument is as follows:

"Francisco Porrata, substitute registrar of property of the city of Humacao and its district, I certify:

That at folio 213 of vol. 40 of the archive 6th of the ayuntamiento of Vieques there is found recorded in the name of Don Manuel Sixto y Andino the farm numbered 292, called "Monte Santo" (description following).

43 At folio 214 of vol. 6 aforesaid there is the following second inscription of the same farm (description following and reciting the mortgage from Manuel Sixto to Laureano Sarria with mortgage back for 16,000 pesos)

At folio 215 of aforesaid vol. 6 there is found the third inscription of the aforesaid farm (reciting the mortgage lien aforesaid)

At folio 216 of said vol. 6 there is found the fourth inscription of said farm, 292, a description of which is as follows: "Rustic property, farm named "Monte Santo," situated in the barrio La Florida, the extent, description, boundaries and circumstances concerning the same appear from the preceding inscription No. 1, and is the same as that made in the title now presented. It appears affected by a mortgage for 16,000 pesos current money in favor of Don Manuel Sixto y Andino, resident of Vieques as appears from the preceding inscription No. 3, and said Señor Sixto having died in the town of his residence on Nov. 27, 1892, without having executed a will in legal form, because three cedulas were declared not to be receivable as a will, Doña Belen Sixto, resident of Vieques, applied

to the court of first instance of this district so that, in accordance with the procedure established by sec. 2 of the Law of Civil Procedure, she be declared heir *ab intestato*, because said Señor Sixto did not leave any legitimate descendants or ascendants and she is the natural daughter, legally recognized, and therefore the only heir of said Señor. The proceedings established by the aforesaid section having been had, and upon the hearing and the conformity of the fiscal, Señor Don Romulo Villahermosa y Borao, judge of the first instance of this district, before the escribano of the court, Don Carmelo Martinez, issued a decree on Nov. 21, 1893, by which he declared to be heir *ab intestato* of Don Manuel Sixto his recognized natural daughter, Doña Belen Sixto, without prejudice to third parties. * * * In virtue of which I record in favor of Doña Belen Sixto the credit which for the sum of 16,000 pesos Don Manuel Sixto had upon the property of this number without prejudice to third parties, and which she acquires by title of intestate inheritance. All of the foregoing appears in the certificate of decree previously mentioned, etc. * * * Feb'y 13, 1894.

At folio 217 of said vol. 6 there is found the fifth inscription of the aforesaid property, No. 292, the description of which is as follows:

The mortgage credit which for the sum of 16,000 pesos and its interest, constituted by Don Laureano Sarria in favor of Don Manuel Sixto and to which the inscription preceding, No. 3, refers, remains and is partially cancelled, because Doña Belen Sixto * * * is the owner of the aforesaid credit, having acquired the same from her father as appears from inscription No. 4 preceding, has confessed and admitted to have received before the act of execution of the instrument which is the object of this inscription the sum of 4,822.50 pesos, which were on deposit in 'Arcos Reales' and which sum was delivered to her by order of the competent court and which sum constitutes the first instalment, besides the sum of 4,000 pesos which she receives at the time of the execution in the presence of the witnesses and the notary authorizing the aforesaid instrument from Don Laureano Sarria, and which two items correspond to the first two instalments of the constituted mortgage of 4,000 pesos each, besides the interest, and they agree that it be partially cancelled. In virtue of which the aforesaid credit of 16,000 pesos is reduced to 8,000 pesos. This appears from a first copy of an instrument of partial cancellation of mortgage in the town of Vieques on the 4th of the current month, which document has been presented in this registry on the fifth day of the current month. * * * April 26, 1894.

44 At the same folio, 217 and over, and on the same property, there is an annotation, letter "A," the literal contents of which are, as follows:

"Rustic property; farm named "Monte Santo," situated in the barrio of "La Florida," municipality of Vieques, the exetent, description, boundaries and other circumstances concerning the same appear from the preceding inscription, No. 1. It appears affected

by mortgage in the sum of sixteen thousand (16,000) pesos, current money, in favor of Dona Maria Belen Sixto y Melendez, as appears from the preceding inscription No. 4, which credit has been reduced to eight thousand (8,000) pesos, of the same money, as appears from the preceding inscription No. 5. In the declarative suit of greater import instituted by Don Adolfo Sixto, resident of St. Thomas, against Dona Belen Sixto y Melendez, resident of Vieques, so that she might recognize him heir *ab intestato* of Don Manuel Sixto y Andino and that the court declare him such heir, upon petition of the plaintiff there have been issued duplicate orders to this registry of property, on the fourth and ninth of the current month, by the judge of *firts* instance of this district, Don Romulo Villahermosa, before the escribano, Don Jose Gabriel Gonzalez, ordering the "preventive" annotation of the said suit on all of the properties which appear recorded in favor of Don Manuel Sixto y Andino or of Dona Maria Belen y Sixto Melendez and which this last acquired as heir of the former, with the object of securing the rights of the plaintiff, and it appearing that the mortgage credit that is a burden upon the property of this number is recorded in favor of Dona Belen Sixto y Melendez, I make the preventive annotation of said suit upon the aforesaid property in favor of Don Adolfo Sixto in order to respond to the consequences of the aforesaid suit. * * * June 12, 1894.

At folio 214 of volume 7 of Vieques, there is found the annotation letter "B," of the property 292, in duplicate, a literal description of which is, as follows: "The preventive annotation, letter "B," made at folio 217 and over, of volume 6 of this same ayuntamiento, in favor of Don Adolfo Sixto to respond to the consequences of the declarative suit for greater import instituted by the aforesaid Senor Sixto against Belen Sixto y Melendez so that he might be declared heir *ab intestato* of Don Manuel Sixto y Andino now remains totally cancelled, because upon petition of the defendant the judge of *firts* instance of this district, Don Romulo Villahermosa, has so disposed before the actuaries Don Antonio Aguilar and Don J. Mariano Reyes, in an order issued on the thirty-first of August, last, by virtue of the aforesaid declarative records of greater import, in which order there is inserted a decree issued on the thirtieth of the said month by the aforesaid judge, before the aforesaid actuaries, ordering said cancellation. * * * September 3, 1894.

At the same folio and volume there is found the sixth inscription of the said property, which is literally, as follows: (Reciting the cession of the mortgage for the balance of eight thousand (8,000) pesos to Don Antonio Roig.) * * * October 16, 1894.

In the same volume and property, at folio 215, is found the seventh inscription, a literal description of which is as follows:—"The mortgage credit of sixteen thousand (16,000) pesos, current Mexican money, and its interest, constituted by Don Laureano Sarria y Gonzalez in favor of Don Manuel Sixto y Andino, to which the preceding third inscription refers, remains totally cancelled, as Don Antonio Roig y Torrellas, married merchant, of age, and resident of this city, the owner of the aforesaid credit, having acquired it from Dona Maria Belen Sixto y Melendez, as appears from the

preceding inscription No. 6, has admitted having received the value of the same from Senor Sarria before the execution of the instrument which is the object of this inscription. In virtue of which there remains and is totally cancelled the aforesaid credit of sixteen thousand (16,000) pesos, current money. This appears from the first copy of an instrument of total cancellation of mortgage executed in this city on the sixteenth of the current month before the notary of the same, Don Marcelino Estevanez, which document has been presented in this registry on the sixteenth of May, according to entry number 934, folio 260, volume 7 of the day book. * * * May 26, 1896.

And thereupon further to maintain the issues on his part the defendant produced and read to the jury a document attached to the record of the suit already introduced in evidence by the plaintiff, a true translation of the material parts of which is as follows:

"I, the undersigned, legalized secretary of the court of first instance of this city, certify: That in the proceedings had at the instance of Don Laureano Sarria in regard to the consignation of the third mortgage instalment of those stipulated for in the instrument of purchase and sale, dated May 15, 1892, and executed in his favor by Don Manuel Sixto for the rustic property called "Monte Santo," situated in the barrio la Florida, municipality of Vieques, there has been decreed the following order:

HUMACAO, *April* 25, 1896.

(1.) Whereas on May 16, of the year last past Don Laureano Sarria, resident and property owner in the island of Vieques in this judicial district, appeared before the court showing that by instrument dated May 15, 1892, Don Manuel Sixto executed in his favor real and effective sale of four rustic properties situated in the barrio La Florida of the aforesaid municipality, grouped together and containing 413 cuerdas of land, named "Monte Santo," which contract was made for the consideration of 16,000 pesos, payable in four instalments of 4,000 pesos each on May 15 of each year from 1893 to 1896 inclusive * * * the said sums being guaranteed by first mortgage on said farm "Monte Santo," and the vendor obligating himself to execute the legal instruments of partial cancellation in favor of the purchaser according as the latter should pay and satisfy the instalments due for the purpose of recording said cancellations; that of said instalments he has paid those corresponding to the years 1893 and 1894 according to the record of the registry of property; that on the 15th of said month of Mam the instalment corresponding to that date fell due and he, in compliance with a superior order issued in the suit prosecuted against Doña Belen Sixto, heir *ab intestato* of Don Manuel Sixto, by Don Adolfo Sixto so that the former might recognize the latter as the natural son of said Don Manuel, having been notified in the month of January of last year to deposit or consign the instalments with this court, and because of the said superior order there was still unpaid

the interest due since said month of January, and that he had knowledge that the heir, Doña Belen Sixto, without any impediment appearing in the registry of property had ceded from the month of September previous the two remaining instalments, which cession was duly recorded in said registry—he, compl-ing with said superior order, deposited and consigned in the very act upon the table of the court the amount of said instalment due, 4,000 pesos besides the interest due and unpaid since Jauuary up to May 16th, the day of his appearance, amounting to 315 pesos;

46 (2.) Whereas the court thereupon held as having been consigned or deposited the sums aforesaid, amounting to 4,315 pesos ordering its entry in the royal treasury as a judicial deposit * * * and a certified copy of the proceedings having been forwarded to the most excellent audiencia of the territory, before which court the declarative records above mentioned were then pending, and another certified copy being delivered party, Sarria, all of which appears to have been complied with;

(3.) Whereas on May 25, 1895, Don Laureano Sarria presented a petition to the court asking that Don Antonio Roig be notified that the deposit had been made and that the latter execute the corresponding document of cancellation of mortgage in respect to the third instalment, or, should he refuse to do so, the aforesaid document be executed "*de officio*," in virtue of which petition it was ordered that notification be made as solicited and what was asked relative to the cancellation was denied as said sums were then deposited in the royal treasury and could not be delivered to any person until the matter was decided by the superior authority. * * *

(5.) Whereas on the 22nd day of the current month the aforesaid Sarria presented a new petition asking that there be ordered delivered to him the sums deposited in the royal treasury at the disposition of the court as there was no longer any doubt as to who was the real mortgage creditor with the right to receive the same corresponding to the third instalment of the mortgage made upon the farm "Monte Santo," as the said creditor was recognized as such by the most excellent audiencia when it ordered, as it did order, him, the said Sarria, to be summoned to pay in the foreclosure proceedings prosecuted by Don Antonio Roig against him, so that he could be able to satisfy unto this creditor the amount of the mortgage instalment which he claimed;—he alleging in favor of his petition that said instalment of the mortgage was so deposited by virtue of the summons made upon him by this court and by order of the superior court, and the object of said proceedings being to prevent the "sucesion" of Don Manuel Sixto, represented by his daughter Doña Belen Sixto, from receiving said sum in payment to the prejudice of Don Adolfo Sixto, who calls himself heir *ab intestato* of said Don Manuel, and all doubt having disappeared when Doña Belen alienated without legal impediment in the registry of property the said mortgage credit, or rather the two remaining instalments, in favor of Don Antonio Roig, because the latter is the only legitimate creditor having the right to receive the same, and because the said

Sarria owes nothing to said "sucesion," as he has not celebrated with it any act or contract from which may arise any obligation enforceable in a suit * * * and that it is, furthermore, legally impossible not to satisfy to the latter the amount of the instalment due and deposited as the creditor is known and certain, and as between said "sucesion" of said Señor Sixto and said Sarria there exists no juridical relation from which any rights might spring or which might give rise to the fulfillment of any civil obligation, he is not comprehended within the question touching the ownership of said sum with the prejudice to his interests as no one can, directly or indirectly, be compelled to the fulfilment of obligations which he has not contracted;

(6.) Whereas, having at sight the records of the declarative suit which Don Adolfo Sixto is prosecuting against Doña Belen Sixto and the records of the foreclosure suit prosecuted by Don Antonio Roig against Sarria, there appears from these last that by a document (reciting the cession by Doña Belen to Roig); and from the records of the declarative suit aforesaid there appears that Sarria was ordered in January, 1895, to retain in his keeping and at the disposition of the court all instalments which he might owe to the "sucesion" of Don Manuel Sixto;

47 (1.) Considering, that the deposit made by Don Laureano Sarria of the mortgage instalment springing from the purchase of the farm "Monte Santo," which was due on May 15, 1895, was not made in accordance with the conditions exacted by art. 1176 and those following of the Civil Code in force.

(2.) Considering, that according to the statements contained in the minutes of said consignation and in the document dated May 16, 1895, said Sarria had knowledge of the fact that by cession which the heir of Don Manuel Sixto had made in September, 1894, without any legal impediment, the said mortgage credit was then found to be recorded in favor of the third party, and because of which circumstance it is evident that when he was summoned in January, 1895, to retain at the disposition of the court the sums which he might owe on account of the instalments to the "sucesion" aforesaid, he at that time owed said "sucesion" nothing and consequently could not retain anything in his possession at the disposition of the court;

(3.) Considering, that in virtue of the foregoing reason advanced by Don Laureano Sarria in aid of his petition that the amounts deposited be returned to him are worthy of consideration and with greater reason since execution has been ordered against him on account of the instalment herein treated of at the instance of the legitimate creditor; and

(4.) Considering, that, as has been explained, the consignation has not been made in proper legal form, and therefore not accepted by the creditor, the debtor Sarria has a right to withdraw the said sums and his obligation remaining subsistent in accordance with what is set forth by art. 1180 of said Civil Code without there

being any legal reasons to deny what is asked for in his preceding petition—

Having seen the legal authorities already cited and the others applicable, the Hon. Angel Acosta, judge of first instance of this city and its district, before me, said; that he should order, and does order, that there be delivered to Don Laure*nao* Sarria the sum *od* 4315 pesos, which was deposited in this court on May 16 of last year * * * and also that a proper record be made in the records of the declarative suit which is being prosecuted in this court by Don Adolfo Sixto against Doña Belen Sixto already above mentioned, and let there be placed in said records by the proper actuary a certified copy of the present decree" (Signed and certified.)

And in compliance with what is ordered by the foregoing decree I insert these presents, which I sign at Humacao, April 28, 1896.

(S'g'd) FRANCO. SOCORRO."

Thereupon the defendant rested his case, and the plaintiff, having no more evidence which he desired to offer, also rested his case. And the foregoing constituted all the evidence given in said cause.

And the said parties having concluded and submitted their testimony in the several matters aforesaid, and having, by their respective counsel, submitted arguments to the jury, the said judge, before said jury retired to consider of their verdict, did then and there of his own motion charge and instruct the jury as follows:

48 And upon the conclusion of said charge of the judge, and before the jury retired from the bar, the plaintiff by his attorney did then and there except to the following paragraph of said charge, to wit:

"On November 21st, 1893, after one of them (the instalments) had become due, one Belen Sixto was declared his heir. That was by a procedure peculiar to the Spanish courts but nevertheless legal; so, under the law being declared such heir, I say to you as a matter of law, that gave her the right to collect the assets of the estate."

For the reason that the same was erroneous and misleading in not defining such right to be without prejudice to the rights of other heirs if such there were.

And the plaintiff by his attorney, before the jury retired from the bar, further excepted to the following paragraph of said charge, to wit:

"On February 15th, 1894, she having been declared the heir, the entry was made of that fact in the registry (of property). I say to you as a matter of law that that declaration of her heirship was without prejudice to the rights of third parties—and that meant that if any other person showed himself afterwards to be an heir he was entitled to a proper proportion of the estate, but so far as a collection of debts and so far as a proper attention to the assets were concerned and the control of them, she became entitled to attend to that."

For the reason that the same was erroneous and misleading in its definition of the effect of said declaration of heirship as affecting the

rights of the plaintiff and in giving the jury to understand that plaintiff's right was limited to a recovery of his proper proportion of said estate from the party so declared heir who had collected it.

And the plaintiff by his attorney, before the jury retired from the bar, further excepted to the following paragraph of said charge, to wit:

"A suit was brought by Adolfo Sixto on April 4, 1894, against Belen Sixto in order to have his right also as an heir declared. The debtor for this purchase money, Sarria, had no notice of this suit until June 5, 1894, and that was after two payments had been made, Belen Sixto having had the right to collect them."

For the reason that said charge was inconsistent with the evidence was erroneous in not charging defendant with liability if he
49 had actual knowledge in place of notice, and in stating that Belen Sixto had the right to collect these instalments in prejudice of the rights of plaintiff.

And the plaintiff by his attorney, before the jury retired from the bar, further excepted to the following paragraph of said charge, to-wit:

"In this contentious suit by Adolfo Sixto against Belen this defendant Sarria was ordered on June 2, 1894, to pay into court whatever money he might be owing. That order was served on Sarria on June 5, 1894 and afterwards that court decided that Sixto, the plaintiff in this suit, was not entitled to attach this money. He obtained an appeal from that judgment, but only from that portion of it that cancelled the annotation made in the registry of deeds of the attachment of that fund. Subsequently on Nov. 27, 1894, an appeal was allowed in the upper court from that portion of it, but no notice was given as to Sarria, who was merely a garnishee in the suit, and who had received no notice not to pay over the money until the lower court decided whether he had the right to pay it over. Between the time the court decided the attachment and the time the appeal was allowed in the upper court, Belen Sixto assigned to Roig the third and fourth instalments. I say to you as a matter of law that there was nothing to hinder her from doing that at that time; she had in law the right to do it."

For the reason that said instruction was confusing and misleading, was contrary to the undisputed evidence in the case, and was erroneous in its statement of law that there was nothing to hinder said assignment from Belen Sixto to Roig at the time it was made.

And the plaintiff did then and there, before the jury retired from the bar and before the said charge of the judge was delivered, pray the judge in writing to instruct the jury as follows:

"As the *ex parte* decree declaring Belen Sixto the heir of Manuel Sixto expressly saved the rights of third parties, that was notice to defendant that any payment made to her was made at his peril as against the rights of other true heirs; and, as defendant was not required by any legal authority to pay the first two payments to Belen Sixto, and as the plaintiff is shown in truth to have been an equal

heir with Belen Sixto, the plaintiff is entitled to recover one-half of those two payments."

But the said judge did then and there decide that said prayer should not be granted, and did then and there refuse to instruct said jury as requested; to which decision and refusal of said judge the plaintiff, by his attorney, did then and there except.

And the plaintiff did then and there by his attorney, be-
50 fore the jury retired from the bar and before said charge of the judge was delivered, further pray the judge in writing to instruct said jury as follows:

"As it is shown by the uncontradicted evidence that the judge of the court of first instance of Humacao was entirely without authority or jurisdiction to issue his order on August 31, 1894, directing the registrar to make annotation on his books of said order, said order to the registrar was void and the annotation made by the registrar was void and the former annotation remained in force, which was notice to all the world including this defendant that the plaintiff had an interest in those payments such as might be declared by the court; and the court having afterwards decided that the plaintiff here is entitled to a one-half interest in said estate, the plaintiff is now entitled to recover one-half of the last two payments, with interest."

But the said judge did then and there decide that said prayer should not be granted, and did then and there refuse to instruct said jury as requested; to which decision and refusal of said judge the plaintiff by his attorney did then and there except.

And the said jury, after having heard the evidence, the charge of the judge and the various matters aforesaid, retired to consider of their verdict, and thereafter returned into court a verdict for the defendant, as more fully appears in the record of said cause.

And forasmuch as the matters above set forth do not fully appear of record, the plaintiff tenders this his bill of exceptions and prays that the same may be signed by the judge of this court pursuant to law; which is done accordingly this 23rd day of Feb'y, A. D. 1903.

WM. H. HOLT, *Judge.*

51 In the United States District Court for Porto Rico, October Term, A. D. 1902.

ADOLFO SIXTO
vs.
LAUREANO SARRIA. } Assumpsit. No. 158.

Comes now the above named plaintiff, by his attorney N. B. K. Pettingill, and complains that in the record and proceedings had in said cause, and also in the rendition of the judgment in the above entitled cause in said United States district court for Porto Rico, at the October term thereof, A. D. 1902, against the said plaintiff on the 29" day of November, 1902, manifest error hath happened to the great damage of said plaintiff.

Wherefore the said plaintiff Adolfo Sixto prays for the allowance of a writ of error to the honorable, the Supreme Court of the United States, and for an order enlarging the time for the preparing and presenting of his bill of exceptions to the rulings of the said court herein, and for such other orders and process as may cause the same to be corrected by the said Supreme Court of the United States.

And petitioner will ever pray.

(Sig.) N. B. K. PETTINGILL,
Attorney for Plaintiff.

52 UNITED STATES OF AMERICA, } ss:
District of Porto Rico, }

The President of the United States to the honorable the judge of the United States district court for Porto Rico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States district court for Porto Rico, before you, between Adolfo Sixto, plaintiff, and Laureano Sarria, defendant, manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears: we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Seal United States District Court for the District of Porto Rico.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 26 day of November, in the year of our Lord one thousand nine hundred and two.

RICARDO NADAL,
Clerk U. S. District Court, District of Porto Rico,
By FRANK ANTONSANTI, *D. C.*

Allowed this 26th day of Nov., 1902.

WM. H. HOLT, *Judge.*

[Endorsed:] U. S. district ct. for P. R. Adolfo Sixto *vs.* Laureano Sarria. Writ of error.

53 UNITED STATES OF AMERICA, } ss:
District of Porto Rico, }

The President of the United States to the honorable the judge of the United States district court for Porto Rico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said United States district court for Porto Rico, before you, between Adolfo Sixto, plaintiff, and Laureano Sarria, defendant, manifest error hath happened to the great damage of the said plaintiff, as by his complaint appears; we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 26 day of November, in the year of our Lord one thousand nine hundred and two.

RICARDO NADAL,
Clerk U. S. District Court, District of Porto Rico,
By FRANK ANTONSANTI, *D. C.*

Allowed this 26th day of No-., 1902.
WM. H. HOLT, *Judge.*

Attest:
A true copy.
RICARDO NADAL, *Clerk,*
By H. H. SCOVILLE, *Deputy.*

[Endorsed:] 158 C. L. Adolfo Sixto *v.* Laureano Sarria. Certified copy of writ of error. Filed clerk's office, United States district court. Dec. 20 1902 Ricardo Nadal clerk of the court. By W. H. Scoville, dep.

53½ Form No. 282. ≠212.

Return on Service of Writ.

UNITED STATES OF AMERICA, } ss:
The District of Porto Rico, }

I hereby certify and return that I served the annexed writ on the therein-named Laureano Sarria by handing to and leaving a true

and correct copy thereof with Thos. D. Mott, Jr., attorney of record for Laureano Sarria personally at San Juan, P. R. in said district on the 22d day of December, A. D. 1902.

E. S. WILSON,
U. S. Marshal,
By H. S. HUBBARD, *Deputy.*

54 UNITED STATES OF AMERICA, *ss:*

To Laureano Sarria, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States district court for Porto Rico, wherein Adolfo Sixto is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 26th day of November, A. D. 1902, and in the one hundred and twenty-seventh year of the Independence of the United States of America.

WM. H. HOLT,
Judge U. S. District Court for Porto Rico.

[Endorsed:] U. S. district ct. for P. R. Adolfo Sixto *vs.* Laureano Sarria. Citation. Marshal's fees. 1 service, $2.00. Expenses, —.

55 Know all men by these presents, that we, Adolfo Sixto, as principal, and Robert H. Todd and A. L. Arpin as sureties, are held and firmly bound unto Laureano Sarria in the full and just sum of one thousand dollars ($1,000.) to be paid to said Laureano Sarrio, his heirs, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals this 3rd day of February, A. D. 1903.

Whereas lately at a session of the United States district court for Porto Rico in a suit pending in said court between said Adolfo Sixto plaintiff and said Laureano Sarria, defendant, a final judgment was rendered against the said Adolfo Sixto on the 26 day of November, 1902, and said Adolfo Sixto having obtained the allowance of a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the suit aforesaid, and a citation directed to the said Laureano Sarria, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said Adolfo Sixto shall prosecute said writ of error to effect and

answer all costs if he fails to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

ADOLFO SIXTO. [SEAL.]
R. H. TODD. [SEAL.]
A. L. ARPIN. [SEAL.]

56 UNITED STATES OF AMERICA, }
District of Porto Rico. }

Robert H. Todd and A. L. Arpin, being duly sworn, each for himself deposes and says that he is one of the parties who has signed the foregoing bond as surety for said Adolfo Sixto, and that he is worth in visible property within the district of Porto Rico subject to levy under execution more than the sum of one thousand dollars over and above all legal exemptions.

R. H. TODD.
A. L. ARPIN.

Sworn to and subscribed before me this 3 day of Feb'y, 1903.

RICARDO NADAL,
Clerk U. S. District Ct.,
By FRANK ANTONSANTI, *D. C.*

Approved by me this 3 day of February, 1903.

RICARDO NADAL, *Clerk.*

57 UNITED STATES OF AMERICA, }
District of Porto Rico, } *ss:*

I, Ricardo Nadal, clerk of the district court of the United States, within and for the district aforesaid, do hereby certify *that* the foregoing — typewritten pages, numbered from 1 to — inclusive to be a full and true and correct copy of the record and proceedings in the above and therein entitled cause as the same remains of record and on file in the office of the clerk of said court, and that the same constitutes the return to the annexed writ of error.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court, at San Juan, P. R., this 12th day of May, A. D. 19–3.

[Seal United States District Court for the District of Porto Rico.]

RICARDO NADAL,
Clerk U. S. District Court, P. R.,
By —— ——, *Deputy.*

[Endorsed:] No. 158. In the district court of the United States, for Porto Rico. Oct. term, 1902. Adolfo Sixto *versus* Laureano Sarria. Transcript.

Endorsed on cover: File No. 18,938. Porto Rico D. C. U. S. Term No. 287. Adolfo Sixto, plaintiff in error, *vs.* Laureano Sarria. Filed May 19", 1903.

7—287

FILE COPY.

Office Supreme Court U. S.
FILED
MAR 4 1904
JAMES H. MCKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 287. 40

ADOLFO SIXTO, *Plaintiff in Error,*

vs.

LAUREANO SARRIA, *Defendant in Error.*

ERROR TO THE UNITED STATES DISTRICT COURT FOR PORTO RICO.

BRIEF FOR PLAINTIFF IN ERROR.

N. B. K. PETTINGILL,
Attorney for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 9676

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 287.

ADOLFO SIXTO, *Plaintiff in Error,*

vs.

LAUREANO SARRIA, *Defendant in Error.*

ERROR TO THE UNITED STATES DISTRICT COURT FOR PORTO RICO.

STATEMENT OF FACTS.

On May 15, A. D. 1892, one Manuel Sixto y Andino, who lived in the island of Vieques, a small island to the east of Porto Rico and politically attached to it, was the owner of a farm or rustic estate which he called "Monte Santo," and on the above date he sold the same to the defendant in error for the sum of 16,000 Mexican dollars, the said price to be paid in four equal installments of $4,000 each on the same day of the years 1893 to 1896, inclusive. In the conveyance executed by said Sixto to said Sarria a mortgage lien was reserved upon said property as security for the payment of said purchase price, in addition to the direct promise of said Sarria to pay the same, with interest, as stipulated. (See Record, page 16.)

On November 27, 1892, the said Manuel Sixto y Andino died intestate, leaving no legitimate children or direct heirs,

but leaving two natural children legally recognized, one a girl by the name of Maria Belen Sixto y Melendez, who lived in Vieques, and the other the plaintiff in error, who lived in the island of St. Thomas. Shortly after the death of said Manuel Sixto this daughter, Maria Belen, presented a petition to the court of first instance of Humacao, Porto Rico, alleging that she was the only recognized child, hence the only heir, of said Manuel Sixto, and praying the court to declare her heir *ab intestato* in accordance with the provisions of sections 980 *et seq.* of the Code of Civil Procedure then in force. This was an *ex parte* proceeding, summary in its character, and during its progress, to wit, on June 22, 1893, the defendant in error paid into the court where it was pending the first installment of his debt to Manuel Sixto, deceased, together with the interest. (See Record, page 32.) And thereafter, on November 21, 1893, the said daughter, Maria Belen, was by decree of said court declared heir *ab intestato* of Manuel Sixto, but this declaration was made, as the law required, *without prejudice to the rights of third parties.* (See Record, page 30.) On the 25th day of the same month of November the assets up to that time received by the temporary administrator named during this proceeding, including the money paid in by said defendant in error, were ordered paid over by said administrator to this daughter, now decreed to be sole heir. (See Record, page 31.)

Meantime—and on the very day previous to the signing of the decree adjudging Maria Belen to be sole heir—the plaintiff in error had presented to the same court his petition to be declared an heir of Manuel Sixto in the exercise of voluntary jurisdiction under the same sections of the code previously proceeded under by said Maria Belen, but on the next day—the very day on which her decree is dated—Maria Belen appeared in opposition to his petition, alleging that she had already been declared sole heir, and that he could only contest her right by a contentious proceeding (*expediente*

contensioso). (See Record, page 17.) The court sustained this contention, from which an appeal was taken by plaintiff in error, but afterward abandoned, and on April 4, 1894, plaintiff in error amended his suit to an "*expediente contensioso*," making said Maria Belen a party defendant, praying the court to declare him an equal heir with her in said estate of Manuel Sixto, and further that, for the better security of his rights, the court issue an order to the registrar of property requiring him to make a cautionary entry in his registry touching the property affected by the suit, and also an order to the defendant in error requiring him to retain at the disposition of the court whatever sums he was indebted to the estate of said Manuel Sixto. (See Record, page 18.)

The notices prayed for were issued on June 2, 1894, the one to Sarria, the defendant in error, being served June 5, 1894, and the one to the registrar on the same day, and duly entered by him, as shown by his return to the court under date of June 12, 1894. (See Record, pages 18 and 19.) The defendant, Maria Belen, was also notified of these orders on June 6, 1894, and on the 26th of the same month she answered plaintiff's petition, and in her answer prayed that the interlocutory order of June 2, 1894, should be vacated and the cautionary notices canceled. On August 30, 1894, this prayer of defendant's answer was granted by the court, and on the very next day (August 31) the corresponding orders to the registrar and to Sarria, the defendant in error, were issued at the same time that notice of the court's action was given to the procurador (solicitor) of the plaintiff. The order for said cancellation reached the registrar on September 1, and entry of cancellation was made on his books September 3, 1894. (See Record, page 20.)

On September 3, 1894, the plaintiff filed his petition for an appeal from the court's order of August 30, praying that it be allowed "with both effects" (see sec. 383, Code of Civil Proc.), but the judge granted the same with only one effect. Upon application to the appellate court the

latter, on November 17, 1894, held that the allowance with both effects had been wrongfully denied, and ordered that it be considered as having been taken for both effects. Thereafter, on December 22, 1894, the appellate court granted a further order that Sarria, the defendant in error, be notified of his obligation under the decree of June 2, 1894, and on the 8th of January, 1895, Sarria was served with a copy of such order of the appellate court, the pertinent part of which is as follows: "That which was ordered in the decree appealed from regarding Mr. Laureano Sarria is hereby set aside, leaving in force the requisition ordered and directed to said Sarria on June 2 by the judge of first instance, until the resolution of the pending appeal." (See Record, pages 20–22.)

The defendant in error pretended not to understand the meaning of this order of the appellate court, so at the request of plaintiff's counsel an explanatory order was issued by authority of said court and served upon him on February 8, 1895. (See Record, pages 22–24.)

In this condition matters rested until November 29, 1895, on which date the appellate court (audiencia territorial) rendered its decision on the merits of the appeal, reversing and declaring null the order of August 30, 1894, and reaffirming the validity and regularity of the order of June 2, 1894. (See Record, pages 24–26.) The final paragraph of said decision is literally as follows (page 26):

"After reviewing the above cited articles, the decree appealed from is hereby revoked, and therefore the *decision of June 2nd* is declared in *full force and effect*, whereby the cautionary annotation was ordered as well as the notification to Sarria, without making any special decision as to costs. Have the records sent back to the judge with a certified copy of this opinion; said judge, Romulo Villahermosa, *being careful to proceed in future in accordance with the law.*"

This decision was certified to the court below in January, 1896, and in March following plaintiff's procurador requested said court to notify both Sarria and the registrar that the order of June 2, 1894, was still in full force and effect, which notices were accordingly issued and served. The defendant in error replied to this notice that:

"Having received notice that the installment of the mortgage has been transferred to Mr. Antonio Roig, who has recorded said transfer in the registry of property, and supposing that he will proceed to collect the same judicially as he did the previous installment, he is unable to accept the notification and he will appear before the audiencia in the premises." (See Record, page 26.)

The registrar also made a reply, refusing to comply with the order for two reasons: First, because subsequent to the illegal cancellation of the cautionary notice the property as well as the encumbrance had been transferred on the registry; and, second, because the mortgage law contained no provision regarding the form of carrying into effect such an order. (See Record, page 26, bottom.) Thereafter the plaintiff asked the court for a further order to the registrar, but this was denied. This case then proceeded to proof and final argument and resulted in a final decree on December 15, 1896, adverse to the plaintiff's rights; from which decree he took an appeal, which was duly admitted in both effects, and on the same day an order was received from the appellate court to admit an appeal in both effects from the rulings denying the further order to the registrar above referred to; and on February 15, 1897, the appellate court consolidated these appeals and ordered the suspension of any further proceedings until their final decision. (See Record, page 27.)

In the above condition affairs remained when the war with Spain resulted in the change of sovereignty in Porto Rico. By military order the territorial audiencia was abolished, and there was created in its place the district court of San Juan. This court on September 29, 1899, ren-

dered its final decision upon said appeals, reversing the action of the court below, declaring the plaintiff to be legally proven an heir of Manuel Sixto, and also reversing the order of June 1, 1896, which carried with it the order of May 16 of the same year, whereby the court below had refused to compel the registrar to obey the order of April 10, 1896, to reinstate the cautionary notice. (See Record, pages 27–29.)

During this long struggle over plaintiff's rights all the installments of the debt had become due. We have already stated the circumstances under which defendant in error paid the first installment into the court of first instance in the *ex parte* proceeding of Maria Belen Sixto to be declared sole heir *ab intestato*. The second installment did not fall due until May 15, 1894, but the defendant in error voluntarily anticipated its payment by making said payment on April 4, 1894, at which time a partial cancellation of the mortgage was executed before a notary relieving the land from any lien so far as the first and second installments were concerned. (See Record, pages 33 and 34.) The court will notice that this payment was made before it was due, without assigning any reason therefor, and *on the very day* that plaintiff in error filed in the Humacao court his complaint in the contentious proceeding which that court had required him to substitute for his attempted *ex parte* proceeding and in which Sarria was soon after given notice not to pay. It was evidently their common purpose to make the payment before notice of plaintiff in error's rights was officially brought home to defendant in error.

The third payment fell due on May 15, 1895. The cautionary notice on the registry had been illegally canceled by the judge of first instance by his order of August 30, 1894, and on September 11, 1895, Maria Belen had taken advantage of this illegal cancellation to transfer the last two installments of this debt with its mortgage security to one Antonio Roig. (See Record, pages 35 and 36.) Roig had

brought some kind of a suit (presumably collusive, as plaintiff in error was not made a party) to compel defendant in error to pay the third installment to him, which they claimed had been done. But the court will notice that before this third payment fell due, to wit, in January, 1895, the appellate court had issued its order to Sarria, and the same had been served, requiring the latter to hold the same until the final determination of the main litigation. (See Record, pages 21 and 22.) This order was never reversed or questioned, though defendant in error stated in his acceptance of the notification that he would "appear before the audiencia (appellate court) in the premises."

The fourth installment fell due May 15, 1896, and defendant in error says he paid it to Roig, "supposing that he will proceed to collect the same judicially, as he did the previous installment" (Record, page 26), although the order of the audiencia of January 5, 1895, was still in full force, and the appeal from the cancellation of the cautionary notice had been allowed for both effects and said cancellation had been declared erroneous by decree of November 29, 1895, of which he had notice on May 4, 1896, if not before. (See Record, page 26.)

Such being the history of the litigation so far as the parties to this suit had been parties, and the final decision having been in favor of the rights of plaintiff in error to be considered a joint heir of his deceased natural father, Manuel Sixto, the present suit was begun in the Federal court for Porto Rico in October, 1902, by the plaintiff in error against the defendant in error, not to enforce any supposed lien upon the property originally conveyed to defendant in error by said Manuel Sixto, but to recover his one-half of the *debt* due by defendant in error to said Manuel Sixto at the time of his death, which had either never been paid or, if paid at all, had been wrongfully paid to persons not entitled to receive it. (See declaration, Record, page 1, and bill of particulars, Record, page 4.)

A demurrer to the declaration was filed and overruled, and then, on November 11, 1902, defendant filed two pleas, one the general issue, and the other a special plea setting forth the death of Manuel Sixto, the *ex parte* proceedings resulting in declaring Belen Sixto sole heir, and the payment by defendant of the first installment into said court where said proceedings were pending under an order issued by said court; also a certain foreclosure proceeding brought by Antonio Roig as owner of the third installment against him, in which an alleged decree was entered requiring him to pay said installment to Roig, which he did in obedience thereto. (See Record, pages 5 and 6.)

Plaintiff in error filed a demurrer to this second plea, which, upon consideration, was overruled by the court (see Record, page 7), and issue was then joined thereon. The trial began on November 14, 1902, and plaintiff concluded his evidence during the following day. After defendant had begun the introduction of his evidence, discovering that he had made no defense as to the second and fourth installments, he asked permission of the court to file an additional plea (see Record, page 31), which was granted over the exception of plaintiff. This plea appears on page 9 of the Record. Thereafter, under the instructions of the court, certain exceptions being taken by plaintiff to the charge to the jury as well as refusals to charge, as requested by plaintiff, the jury returned a verdict for defendant, upon which judgment was duly entered. (See Record, page 10.) From said judgment a writ of error has been duly sued out to this court, and the following errors assigned (Record, pages 12–14):

I.

The court erred in overruling the demurrer of plaintiff to the pleas filed therein by defendant on November 11, 1902.

II.

The court erred in allowing the defendant, during the trial of said cause, and after the plaintiff had rested his case, on November 15, 1902, to file his additional plea and compel plaintiff to join issue thereon against the objections made by the plaintiff thereto.

III.

The court erred in allowing the defendant, as a witness in his own behalf, to testify against the objection of the plaintiff, with reference to the last two installments of the debt, which was the subject-matter of the suit, as follows, to wit:

"I was ordered by the audiencia territorial to pay the same (meaning the installments) to Roig."

IV.

The court erred in allowing the defendant to introduce in evidence, against the objection of the plaintiff, the certificate of the registrar of property as to the entry in said registry affecting the title to a farm called "Monte Santo," a mortgage on which had been given merely as security for the debt which was the subject-matter of the suit.

V.

Because the court erred in charging the jury, against the objection and exception of the plaintiff, in the following language, to wit:

"On November 21st, 1893, after one of them (the installments) had become due, one Belen Sixto was declared his heir. That was by a procedure peculiar to the Spanish courts but nevertheless legal; so, under the law being declared such heir, I say to you as a matter of law, that gave her the right to collect the assets of the estate."

VI.

The court erred in charging the jury, against the objection and exception of the plaintiff, in the following language to wit:

"On February 15th, 1894, she having been declared the heir, the entry was made of that fact in the registry (of property). I say to you as a matter of law that that declaration of her heirship was without prejudice to the rights of third parties—and that meant that if any other person showed himself afterwards to be an heir he was entitled to a proper proportion of the estate, but so far as a collection of debts and so far as a proper attention to the assets were concerned and the control of them, she became entitled to attend to that."

VII.

The court erred in charging the jury, against the objection and exception of the plaintiff, in the following language, to wit:

"A suit was brought by Adolfo Sixto on April 4, 1894, against Belen Sixto in order to have his right also as an heir declared. The debtor for this purchase-money, Sarria, had no notice of this suit until June 5, 1894, and that was after two payments had been made, Belen Sixto having had the right to collect them."

VIII.

The court erred in charging the jury, against the objection and exception of the plaintiff, in the language following, to wit:

"In this contentious suit by Adolfo Sixto against Belen this defendant Sarria was ordered on June 2, 1894, to pay into court whatever money he might be owing. That order was served on Sarria on June 5, 1894, and afterwards that court decided that Sixto, the plaintiff in this suit, was not entitled to attach this money. He obtained an appeal

from that judgment, but not from that portion of it that canceled the annotation made in the registry of deeds of the attachment of that fund. Subsequently, on November 27th, 1894, an appeal was allowed in the upper court from that portion of it, but no notice was given as to Sarria, who was merely a garnishee in the suit, and who had received no notice not to pay over the money until the lower court decided whether he had the right to pay it over. Between the time the court decided the attachment and the time the appeal was allowed in the upper court, Belen Sixto assigned to Roig the third and fourth installments. I say to you as a matter of law that there was nothing to hinder her from doing that at that time; she had in law the right to do it."

IX.

The court erred in refusing to charge the jury, upon the written request of the plaintiff, in the language or to the effect following, to wit:

"As the *ex parte* decree declaring Belen Sixto the heir of Manuel Sixto expressly saved the rights of third parties, that was notice to the defendant that any payment made to her was made at his peril as against the rights of other true heirs; and, as defendant was not required by any legal authority to pay the first two payments to Belen Sixto, and as the plaintiff is shown in truth to have been an equal heir with Belen Sixto, the plaintiff is entitled to recover one-half of those two payments."

X.

The court erred in refusing to charge the jury, upon the written request of the plaintiff, in the language or to the effect following, to wit:

"As it is shown by the uncontradicted evidence that the judge of the court of first instance of Humacao was entirely without authority or jurisdiction to issue his order on August 31, 1894, directing the registrar to make annotation on his books of said order, said order to the registrar was void and the annotation made by the registrar was void and

the former annotation remained in force, which was notice to all the world including this defendant that the plaintiff had an interest in those payments such as might be declared by the court; and the court having afterwards decided that the plaintiff here is entitled to a one-half interest in said estate, the plaintiff is now entitled to recover one-half of the last two payments, with interest."

ARGUMENT.

The first two assignments of error may be argued and considered together, so far as the merits of the respective pleas are concerned.

The demurrer speaks of the "second and third" pleas because they were paragraphed separately and were at the time so considered, but the two paragraphs are doubtless in legal effect one plea, which is found on pages 5 and 6 of the Record. The demurrer is found on page 7 and contains two grounds: first, because the matter alleged does not constitute any legal or sufficient defense to plaintiff's cause of action, or to his right to claim payment of the installment referred to; and, second, because it set forth matters concerning an alleged suit between defendant and a third party, to which neither plaintiff nor any privy of his was a party; hence the result could not bind the plaintiff. This demurrer should have been sustained.

(*a.*) The first ground was good, because the plea was defective in form. It begins as a "second plea to the *declaration*" as a whole, while the body of it is found upon inspection to present a defense at best to only two out of four installments claimed by the declaration. It is well settled that under the common-law system of pleading (which prevails in the Federal court of Porto Rico) a plea which in

form goes to the whole declaration, yet in fact presents a defense to only a portion of the cause of action, is demurrable.

Hogan *vs.* Ross, 13 How., 173, 182.
Wood *vs.* Franklin, 3 Cranch (C. C.), 115.
Cook *vs.* Tribune Ass'n, 5 Blatchf., 352.
Gillespie *vs.* Thomas, 15 Wend., 464.
Flemming *vs.* Hoboken, 40 N. J. L., 270.

In the case of Hogan *vs.* Ross, *supra*, the court says:

"It is a settled rule in pleading, that wherever a plea in its commencement professes to respond to the entire declaration or count, and is in substance and reality in answer to part only of such declaration or count, the plea is bad, and the defect may be availed of on demurrer. * * * In the case before us, every plea tendered by the defendants embraces within its commencement the entire cause of action, averring that the plaintiff should not have or maintain his action; yet each of them in its body and substance is limited to the condition of the injunction bond and to some stipulation in that condition to which each plea specifically refers. The pleas demurred to, therefore, could not but be properly overruled."

(*b.*) The first ground was also good as to the substance of the first paragraph of said plea—*i. e.*, the allegations regarding the payment of the first installment of the debt. These allegations in substance were (after a recital explaining the creation of the debt) that Manuel Sixto died intestate; that by "proceedings *ab intestato*" in a court of general jurisdiction touching the settlement of his estate the defendant had been ordered by the court to pay and deposit said installment in said court, and in obedience to such order had paid the same, with interest, into said court. There was no allegation that plaintiff was a party to these proceedings, and, unless such proceedings were *in rem*, any action of the court therein could not affect plaintiff's rights. As the alleged proceedings were described as "proceedings *ab intestato*," the

court, in deciding the demurrer, was bound to take notice of their character and the law governing them and their effect. This is found in sections 977 *et seq.* of the Code of Civil Procedure, which in the original Spanish reads as follows:

"977. Practicadas las medidas indispensables para la seguridad de los bienes, ordenadas en la sección anterior, y sin perjuicio de continuar en las mismas diligencias la formacion de inventario, se procederá en pieza separada á hacer la declaración de herederos abintestato.

"978. Tambien podrá hacerse esta declaracion á instancia de los interesados, sin que precedan dichas diligencias, en los casos en que no sea necesaria ni se solicite la prevención del abintestato.

"979. Los herederos abintestato, que sean descendientes del finado, podrán obtener la declaración de su derecho justificando con los correspondientes documentos, ó con la prueba que sea posible, el fallecimiento de la persona de cuya sucesión se trate y su parentesco con la misma; y con información testifical, que dicha persona ha fallecido sin testar, y que ellos, ó los que designen, son sus únicos herederos.

"Para deducir esta pretension no necesitarán valerse de Abogado ni de Procurador.

"980. Dicha información se practicará con citación del Promotor fiscal, á quien se comunicará después el expediente por seis dias para que dé su dictamen. Si éste encontrare incompleta la justificación, se dará vista á los interesados para que subsanen la falta.

"También se practicará el cotejo de los documentos presentados con sus originales, cuando lo pidiere el Promotor fiscal, ó el Juez lo estimare necesario.

"981. Practicadas las diligencias antedichas, el Juez, sin mas trámites, dictara auto, haciendo la declaración de herederos abintestato si la estimare procedente, ó denegándola con reserva de su derecho á los que lay hayan pretendido, para el joicio ordinario. Este auto será apelable en ambos efectos."

The sections following treat of manner of recognition of heirs in ascending or collateral lines up to section 1000. Then follows:

"1001. Hecha la declaración de herederos abintestato por

auto ó sentencia firme, se acomodará este juicio á los trámites establecidos para el de testamentaria.

"1002. El Juez mandará que se entreguen á los herederos reconocidas todos los bienes, libros y papeles del abintestato, y que el administrador les rinda cuentas, cesando la intervención judicial,"

continuing with some exceptions which are not material.

The translation of the foregoing sections as officially made and published by the Division of Insular Affairs of the United States War Department in the year 1901 is as follows (the sections being numbered one lower than in the Spanish edition):

"976. After the measures indispensable for the security of the property prescribed in the foregoing section have been taken, and without prejudice to including in the same proceedings the making of the inventory, the designation of heirs *ab intestato* shall be proceeded with in a separate record.

"977. This designation may also be made at the instance of the interested parties, without the necessity of previously taking the steps mentioned, in cases in which they are not necessary and in which the institution of intestate proceedings is not requested.

"978. Heirs *ab intestato* who are descendants of the deceased, may obtain a declaration of their rights by proving with the proper documents or with the evidence obtainable, the death of the person whose estate is in question, their relationship to the same, and with the evidence of witnesses that said person died intestate, and that they, or the persons whom they designate, are his only heirs.

"The services of a solicitor or attorney are not necessary in order to present this claim.

"979. The deputy public prosecutor shall be cited to appear at said proceeding, to whom the record shall afterward be referred for the period of six days for his report thereon.

"Should he find the proof insufficient, a hearing shall be granted to the interested parties in order that they may cure the defect.

"When the deputy public prosecutor requests it, or the

judge considers it necessary, the documents presented shall be compared with the originals.

"980. When the foregoing steps have been taken, the judge shall, without further proceedings, make a ruling designating the heirs *ab intestato* should he deem it proper, or he may refuse to make such declaration, reserving the rights of the claimants to institute an ordinary action. This ruling may be appealed from both for review and a stay of proceedings. * * *

"1000. After the declaration of heirs *ab intestato* has been made, by a final judgment or ruling, the proceedings shall be continued according to the procedure prescribed for testamentary proceedings.

"1001. The judge shall order that there be delivered to the heirs instituted all the property, books, and papers of the intestate, and that the administrator render an account of his administration to them, the judicial intervention ceasing."

From this it clearly appears that the proceedings attempted to be set up as causing a discharge from liability for the first installment by virtue of its payment into court therein were no more than summary *ex parte* proceedings, wherein no process was issued and not even a publication made as notice to the world. The *declaration of heirship* was the sole end and object of the proceeding, for, while one section speaks of an "administrator" being appointed, such an official under the Spanish law means nothing more than what we would call a "curator," *i. e.*, a temporary custodian of the effects of the dead person, pending the *ex parte* adjudication, as is shown by the last section cited. This speaks only of three kinds of property belonging to the deceased, to wit, his books, his papers, and his "bienes." While the last word is translated into English as "property," it really means only *real* property, or, at most, includes such visible and tangible personalty as would need care and preservation by a temporary curator. There is no word in any part of this statute authorizing this "administrator" to assume control over choses in action or to pay or collect

debts. In other words, the administration or settlement of the estate, as we understand these terms, was no part of this proceeding, as, upon the turning over of the visible assets enumerated as likely to have come into the temporary possession of this so-called "administrator," "the judicial intervention ceasing" (ceased).

Any alleged order of the court in this proceeding requiring a debtor of the estate to pay over his debt to this "administrator" would therefore be entirely void. This is further shown by the provisions of section 381 of the mortgage law, which in Spanish and English reads as follows:

"381. Los bienes adquiridos por herencia ó legado no pueden ser liberados sino después de transcurridos cinco años desde la fecha de su inscripción en el registro."

"Property acquired through inheritance or legacy cannot be cleared until five years have elapsed from the date of their record in the registry."

In any event, the rights of the plaintiff in error could not be concluded by the proceedings of a court wherein neither he nor any privy of his was a party and of which he had neither notice nor knowledge. This is so well settled that citation of authority is hardly necessary, but we cite the following cases showing that the decisions of the American and Spanish courts of last resort are harmonious:

Powers *vs.* Johnson, 139 U. S., 156.

Bedon *vs.* Davie *et al.*, 144 U. S., 142.

Dupasseur *vs.* Rochereau, 21 Wallace, 130; 4 Louisiana, 382.

Cansino *vs.* Mison (Sup. Ct. of Spain), vol. 4, Jurisp. Civil, 212 (sentencia of March 28, 1859).

Civil Code of Porto Rico, art. 1252.

The last paragraph of the opinion in Bedon *vs.* Davie, *supra*, is as follows:

"As the plaintiffs in the present suit, the heirs-at-law of Dr. William Richardson Davie, were not parties to the suit of Beckham against De Saussure, the judgment in that suit was of no force or effect in favor of the plaintiff in error as against the decree in the suit of Frazer *vs.* Davie."

The Spanish and English versions of the above-cited article 1252 of the Civil Code are as follows:

"Para que la presunción de cosa juzgada surta efecto en otro juicio, es necesario que, entre el caso resuelto por la sentencia y aquél en que ésta sea invocada concurra la más perfecta identidad entre las cosas, las causas, las personas de los litigantes y la calidad con que lo fueron.

"En las cuestiones relativas al estado civil de las personas y en las de validez ó nulidad de las disposiciones testamentarias, la pre sunción de cosa juzgada es eficaz contra terceros, aunque no hubiesen litigado," etc.

"In order that the presumption of the *res adjudicata* may be valid in another suit, it is necessary that, between the case decided by the sentence and that in which the same is invoked, there be the most perfect identity between the things, causes, and persons of the litigants, and their capacity as such.

"In questions relating to the civil status of persons, and in those regarding the validity or nullity of testamentary provisions, the presumption of the *res adjudicata* shall be valid against third persons, even if they should not have litigated."

The latter clause, so far as it affects our case, is limited to questions relating to the "validity or nullity of *testamentary* provisions," while the proceeding of which we are treating was rendered possible only by *lack* of a testament (*ab intestato*).

This provision, however, is even more restricted by the sentencia of the supreme court of Spain above cited, which involved the question of the nullity of a will by which a certain legacy had been bequeathed for the benefit of poor persons, and in which the court not only held the general

principle that " decrees of courts do not prejudice or bind those not parties thereto," but refused to sustain a decree of the lower court declaring the will in question null until some representative of these interested beneficiaries had been summoned before the court to be heard upon the question, and remanded the case again for that purpose.

(c.) The first ground of demurrer was also good as to the merits of the second paragraph of said plea. This paragraph set up as a defense, so far as the third installment of the debt was concerned, a judgment of the "audiencia territorial," rendered February 18, 1896, in a foreclosure suit for the collection of this installment, brought by one Antonio Roig, as assignee or purchaser from the other heir, Belen Sixto, against the defendant in error, in which a judgment of foreclosure was entered and Sarria was compelled to pay by threat of execution.

This plea could only be good by virtue of the principles of estoppel or *res judicata*, for the application of which it was necessary to allege that plaintiff in error had been party or privy in some way to said litigation so that its result should be binding upon him. This is not alleged, and, as subsequently appeared from the evidence, was not the fact; hence the authorities last above cited apply and the ruling of the court was erroneous.

The salutary effect of this rule, holding persons not bound or affected by the results of litigation to which they are not parties, can never be better illustrated than in this instance. This decree between Roig and Sarria was made by the audiencia little more than two months after the same court had reversed the court below as to the cancellation of the notice to Sarria in the suit to which our client *was* a party, had declared valid and in full force the order requiring him to hold this same money to abide the result of the suit in which the order was issued, and which order they had also reinforced by a direct one of their own. Only one logical

conclusion is possible, which is that the Roig-Sarria suit was collusive, and, as the record went to the appellate court, did not show all the facts; in other words, Sarria had an arrangement with Roig to their mutual advantage and did not *try* to avoid the payment.

(*d.*) The second ground of the demurrer simply set out more specifically the ground above argued as to the insufficiency of both paragraphs of the second plea, and the argument in support thereof is covered by what has been said upon the first ground.

(*e.*) The objections to the additional plea filed during the trial on November 15, 1902 (Record, page 9), are found on page 31 of the Record, which constitutes the second assignment of error.

So far as the exercise of the court's discretion in allowing the filing of this plea depended upon the question of the *time* at which it was offered, we will not further urge our objection, as, if the plea had presented a valid defense, the filing might have been allowable as a stretch of discretion "in furtherance of justice," but we still urge and insist that the last ground of objection was well taken, to wit, "that said plea was defective, insufficient, and demurrable for the same reasons set forth in the demurrer theretofore filed by plaintiff to the original plea," and therefore said additional plea should have been refused.

The first paragraph, which refers to the second installment, merely alleges, as to it, that Belen Sixto had, before its payment, been declared heir *ab intestato* of Manuel Sixto and was then the *record* owner of said mortgage credit. (The printed record reads "*second* owner," but that is clearly a clerical error.) This paragraph is clearly more defective than the first paragraph of the second original plea, because it does not even allege that such payment was ordered by any court, but implies that it was voluntary.

The second paragraph covers both the third and the fourth installments and merely alleges that Belen Sixto had assigned them to one Roig, which assignment had been duly recorded, and said installments thus appeared to belong to Roig, and defendant paid them to him.

It makes no claim that the payment was other than voluntary. It also omits any allegation as to why Belen Sixto had any alleged right to own or transfer them, and even if it did it would still be insufficient, because *non constat* that she did not transfer them subject to the claim of plaintiff in error by virtue of the cautionary notice, as is shown by article 71 of the mortgage law, which, speaking of these cautionary notices, says:

"Los bienes inmuebles o derechos reales anotados podran ser enajenados o gravados, pero sin perjuicio del derecho de la persona a cuyo favor se haya hecho la anotacion."

(*Translation.*)

"The real property or property rights which are entered (*i. e.*, noted against) may be conveyed or encumbered, but without prejudice to the right of the person in whose favor the entry (cautionary notice) was made."

As these two paragraphs were tendered as an "additional plea," we submit that they must stand or fall by themselves as against a demurrer or objection to filing; that, so considered, they clearly represent no sufficient defense of payment as to the second, third, and fourth installments, and that they were even more subject to the demurrer than the second plea originally filed, aside from the question of greater scrutiny to which a plea offered late should be subjected.

The discussion of the assignments of error to the charge of the court based upon and referring to the defenses set up by these pleas will necessarily include the question of their sufficiency, and we therefore ask the attention of the court to subdivisions IV and VI of this brief.

II.

The third assignment is that the court erred in allowing defendant, as a witness in his own behalf, to testify orally, with reference to the last two installments of the debt sued for, that he "was ordered by the audiencia territorial to pay the same to Roig."

The objections made were that "the subject inquired about was immaterial and irrelevant to the issues made," and that "it was not shown that the plaintiff was a party to any such suit, and if not a party he could not be bound or his rights affected by any decree or order made therein" (Record, page 35).

The ruling upon this objection was important, because this oral statement was the only evidence admitted which supported defendant's pleas of payment as to the third and fourth installments. The only other evidence referring in any way to the matter was the two documents appearing in the Record at pages 35 to 36 and 40 to 43, but the reference therein is wholly by way of *recital*, and such recitals are not evidence against persons not parties to said instruments.

Civil Code of Porto Rico, art. 1186.
Herron *vs.* Dater, 120 U. S., 464.
Murphy *vs.* Packer, 152 U. S., 398.

The first citation is from the Civil Code of Porto Rico as adopted by the Legislative Assembly of Porto Rico and approved by the governor March 1, 1902, and in force at the time of the trial, of which the English version is official and is as follows:

"SEC. 1186. Public instruments are evidence, even against a third person, of the fact which gave rise to their execution and of the date of the latter.

"They shall also be evidence against the contracting parties and their legal representatives with regard to the declarations the former may have made therein."

In the case of Herron *vs.* Dater, *supra*, the court, at page 478, speaking of a recital in a patent to which plaintiffs were neither parties nor privies, says:

"Peter Grahl, the patentee, was not connected with the title under the warrant and survey, otherwise than by the recital contained in the patent itself, that the tract had been previously conveyed to him by Lewis Walker. Clearly that recital was not evidence against the plaintiffs, for if the patent could not take effect against them without it, it could not give any effect to that recital."

(*a.*) The second ground of objection was made in pursuance of the position assumed upon the pleas as to these same installments, and the authorities already cited in the discussion of the demurrer are again referred to. The previous answer of the witness had closed with the statement "Roig sued me to *foreclose* the third installment." This is the only evidence of the character of that suit, which is thus fixed by defendant's own admission. The only exceptions to the rule that records of suits are *res inter alios acta* as to persons not parties are some suits *in rem*. It is settled beyond question that a suit to foreclose a mortgage is not a suit *in rem*, but is personal and transitory wherever the mortgage does not convey the legal title but constitutes in legal effect only a lien.

Gill *vs.* Bradley, 21 Minn., 15.
Cole *vs.* Connor, 10 Iowa, 299.
Chouteau *vs.* Allen, 70 Mo., 353.
Dupasseur *vs.* Rochereau, 21 Wall., 130.

But, even if it were *in rem.*, it could not operate to the prejudice of third parties without some notice by publication or otherwise of its pendency.

Hassal *vs.* Wilcox, 130 U. S., 493.

(*b.*) The first ground of objection was intended to cover the insufficiency of the answer, because an oral statement would

be inadmissible as proof of what must be a matter of record, which record must be produced.

Morgan *vs.* Abbey *et al.*, 63 Cal., 56.
Woodbridge Co. *vs.* Ritter, 70 Fed., 677 (C. C. A.).
B. & O. R. R. Co. *vs.* Rambo, 59 Fed., 75 (C. C. A.).
Weatherhead *vs.* Baskerville, 11 How., 329.
Taylor *vs.* Riggs, 1 Pet., 591.

The statement objected to was inadmissible upon any ground, and its effect could not help being highly prejudicial to plaintiff in error.

III.

The fourth assignment of error is to the admission in evidence on behalf of defendant in error of a certificate issued by the registrar of property as to the entries in said registry affecting the title to the real estate by virtue of the mortgage given by defendant in error to secure the payment of his debt sued for in this action.

The grounds of objection to the introduction of this certificate were "that said document was only secondary evidence of the matters therein certified; that it did not contain the full contents of the instruments registered, but only a memorandum or extract of what, in the registrar's opinion, was the legal purport of such instruments, and that the instruments so recorded themselves, or proper copies thereof, were the best evidence of the transactions" (Record, page 37).

The validity of this objection can be seen from the material parts of said certificate, which are copied in the Record on pages 37 to 40, which show that the "inscription" is not a literal copy of the instrument recorded, but only a memorandum. For example, take the so-called decree of the court declaring Belen Sixto heir *ab intestato*. The "inscription" of that decree appears copied at the bottom of

page 37 and the top of page 38 of the Record. The full copy was in that instance also introduced by defendant and appears on page 30 of the Record. The other entries are of a precisely similar character. The same is further shown by the provisions of the law governing these inscriptions, which is contained in article 9 of the mortgage law (official translation, U. S. War Dep't, page 12) and reads as follows:

"Every record made in the registry shall contain the following details:

"1. The nature, location and bounds of the realty which is the subject of record, or which is affected by the interest which is to be recorded, its superficial area measured according to the standard used in the country, and its equivalent in the metrical system, and its name and number, if they appear in the deed.

"2. The nature, extension, conditions, and liens of any kind, of the interest recorded and its value, if it appear in the deed.

"3. The nature, extension, conditions, and liens of the interest on which is created that which is subject of record.

"4. The nature of the instrument which is to be recorded and its date.

"5. The name and surname of the person, if it is an individual, or, if not, the name of the corporation, or the names of all the parties interested in whose favor the record is made.

"6. The name and surname of the person, or the name of the corporation, or of the legal person who is the last owner of the interests or estates which are to be recorded.

"7. The name and location of the court, notary, or official who executes the instrument which is to be recorded.

"8. The date of the presentation of the instrument to the registry, with a statement of the time.

"9. The conformity of the record with the copy of the instrument from which it was taken, and if the latter is one of those which are to be kept in the office of the registry, the liber in which it is entered will also be indicated.

"10. The date of the record and the full signature of the register."

In connection with these provisions we cite sections 1188 to 1190 of the Civil Code, which went into force in Porto Rico on July 1, 1902 (before the date of the trial), as to what kind of evidence of instruments should be admitted. This latter code was enacted in the English language, but it is an exact re-enactment of the articles numbered 1220 to 1222 inclusive. These sections read as follows:

"1188. Copies of public instruments of which there is an original or protocol, contested by those they prejudice, shall have force of proof only when they have been duly collated.

"Should there be any difference between the original and the copy the contents of the former shall govern.

"1189. Should the original instrument, the protocol, and the original record have disappeared, the following shall constitute evidence:

"1. First copies made by the public official who authenticated them.

"2. Subsequent copies issued by virtue of a judicial mandate, after citing the persons interested.

"3. Those which, without a judicial mandate, may have been taken in the presence of the persons interested and with their consent. In the absence of the said copy, any other copies, thirty or more years old, shall be evidence, provided they have been taken from the original by the official who authenticated them or by any other in charge of their custody.

"Copies less than thirty years old, or which may be authenticated by a public official, in which the circumstances mentioned in the preceding paragraph do not concur, shall serve only as a basis of written evidence.

"The force of proof of a copy shall be weighed by the courts according to the circumstances.

"1190. The entry in any public registry of an instrument which may have disappeared shall be weighed according to the rules established in the last two paragraphs of the preceding article."

These quotations of the law plainly show that the certificate offered should not have been admitted in the absence of proof of the loss of all primary evidence. Such statutes must be strictly followed.

Smith *vs.* United States, 5 Pet., 292.

Moreover, the admission of this certificate was important and prejudicial to the interests of plaintiff in error, not only because of its violation of the rules regulating the *kind* of evidence admissible in proof, but also because the admission of such a certificate had a tendency to mislead the jury as to the issues being tried, leading them to believe that if the mortgage lien had been canceled, whether rightfully or wrongfully, the debt itself had been released and plaintiff could not recover. In fact we believe the court itself became confused as to the distinction between the existence of the *debt* and the existence of the *lien*, and such confusion caused the erroneous ruling on the evidence and the misleading charges.

IV.

The fifth, sixth, and ninth assignments of error may be argued together. The fifth excepted to the following paragraph of the charge given by the court to the jury:

"On November 21st, 1893, after one of them (the installments) had become due, one Belen Sixto was declared his heir. That was by a procedure peculiar to the Spanish courts but nevertheless legal; so, under the law being declared such heir, I say to you as matter of law, that gave her the right to collect the assets of the estate."

The sixth assignment excepted to the following paragraph upon the same subject:

"On February 15, 1894, she having been declared the heir, the entry was made of that fact in the registry (of property). I say to you as a matter of law that that declaration of her heirship was without prejudice to the rights of third parties—and that meant that if any other person showed himself afterwards to be an heir he was entitled to a proper proportion of the estate, but so far as a collection of debts and so far as a proper attention to the assets were concerned and the control of them, she became entitled to attend to that."

The ninth assignment excepted to the court's refusal to give the jury the following instruction requested:

"As the *ex parte* decree declaring Belen Sixto the heir of Manuel Sixto expressly saved the rights of third parties, that was notice to the defendant that any payment made to her was made at his peril as against the rights of other true heirs; and, as defendant was not required by any legal authority to pay the first two payments to Belen Sixto, and as the plaintiff was shown in truth to have been an equal heir with Belen Sixto, the plaintiff is entitled to recover one-half of those two payments."

(*a.*) These two charges and the request refused present the direct conflict between the views of the court and the contentions of plaintiff in error as to the law governing the payment of the first two installments. The argument already made and authorities cited in the first subdivision of this brief, discussing the sufficiency of the pleas under which defendant's evidence of the payment of these installments was introduced, is applicable to these assignments and reference is prayed thereto in support thereof; but at the time of ruling upon the pleas all of their allegations were, of course, taken as true. The evidence had, however, in some respects failed to support them. For instance, the decree declaring Belen Sixto heir *ab intestato*, when introduced, showed upon its face that such declaration was expressly limited to be "without prejudice to third parties" (Record, page 30, bottom); also there was absolutely no evidence supporting the allegation that the first installment had been paid "in obedience to an order of said court." The nearest approach to such evidence is a *recital* in the *receipt* which he obtained for such payment, which recital is as follows (Record, page 32):

"And the aforesaid deposit he makes in compliance with the order of this court of first instance, dated the 15th of the current month, and which decree was issued in the preliminary proceedings presented," etc.

But no such order or decree was introduced in evidence, and that recitals are not evidence in such cases, see the authorities already cited under subdivision II of this brief.

There was no sufficient evidence whatever in support of the plea covering the second installment, unless this court should hold that similar recitals in the instrument of partial cancellation and in the document attached to the record introduced by plaintiff and the oral statement of defendant were admissible and sufficient. We contend that none of these were proper evidence. If that contention is sound, then clearly neither of the above charges excepted to were proper to be given to the jury under the evidence.

(*b.*) But, even if there was some evidence in support of these pleas, we still contend that the charges did not correctly state the law.

1st. As to the first payment, there was no proof of any order of court, and the decree necessarily stated that it was "without prejudice to third persons." Why was this limitation put in the decree? The provisions of the mortgage law explain it. The pertinent parts of articles 2 and 23 of said law, in Spanish and English, are as follows:

"2. En los Registros expresados en el artículo anterior se inscribiran:

"1°. Los titulos traslativos del dominio de los inmuebles ó de los derechos reales impuestos sobre los mismos.

"2°. Los títulos en que se constituyan, reconozcan, modifiquen, o extingan derechos de usufructo uso, habitacion, enfiteusis, hipotecas, censos, servidumbres y otros cualesquiera reales. * * *

"23. Los titulos mencionados en los artículos 2° y 5° que no estén inscritos en el Registro, no podrán perjudicar á tercero.

"La inscripción de los bienes inmuebles y derechos reales adquiridos por herencia o legado, no perjudicara á tercero, si no huviesen transcurrido cinco años desde la fecha de la

misma. Exceptúanse los casos de herencia testada o intestada, cuando recaiga en herederos necesarios." * * *

"2. In the registries mentioned in the preceding article shall be recorded:

"1. Instruments transferring or declaring ownership of realty, or of property rights thereto.

"2. Instruments by which rights of use, use and occupancy, emphyteusis, mortgage, annuity, servitudes, and any others by which estates are created, acknowledged, modified, or extinguished. * * *

"23. The instruments mentioned in articles 2 and 5 which are not duly recorded or entered in the registry cannot prejudice third persons.

"The record of real property and property rights, acquired through an inheritance or legacy, shall not prejudice third persons until five years have elapsed since the date thereof, excepting in cases of testate or intestate inheritances, legacies and additions thereto, when left to legal heirs."

The last paragraph is in consonance with article 381 of the same law, already cited in subdivision 1 of this brief.

Such a summary and temporary proceeding as that of the *ex parte* declaration of heirship *ab intestato* under the civil procedure before cited must therefore necessarily be "without prejudice to third persons," and, as hereinbefore suggested, no authority was given thereby to collect debts or to do more than take charge of the property in actual possession of the deceased and preserve it from waste and destruction.

The charge of the court in effect limited the meaning of the phrase "without prejudice to third parties" so as to shut out an absent heir from being included in the term "third parties" and leaving him solely with redress against those who might have been declared heirs in his absence, and of course, as a result, if such heirs have frittered away the inheritance or have converted it into cash and put it in their pockets, the absent heir remains remediless, and all this by force of a proceeding absolutely *ex parte*, in which no process

or notice is issued to anybody. We submit that this cannot be the law in any country, and especially where the supreme court of that country has declared, in exact concordance with our own laws, that judgments of courts bind only parties and privies (sentencia of March 28, 1859, hereinbefore cited).

We have been unable to discover any decision of the supreme court of Spain involving the exact question here in controversy, but one of the leading commentators, or, as we should call them, text-writers, upon Spanish law is Galindo, who, in his work upon the mortgage law, in discussing the legal effects of the provisions of the last paragraph of article 23, above quoted, expresses his opinion in the following words:

"Aplicado estrictamente el principio del art. 23, podria convertirse el Rigistro de la propriedad, en medio seguro para burlar legítimos derechos que por circunstancias especiales no pudieran ejercitarse en determinados momentos, y que el legislador no debía dejar desamparados.? Quién puede asegurar que un testamento que se presenta como titulo de adquisición, no está revocado?? Quién puede afirmar que los que se declaran herederos *ab intestato* son en efecto los que tienen mejor derecho á la herencia? * * *? sería justo, dada la imposibilidad de aducir pruebas legales de que el que inscribe es el verdadero heredero, aplicar el principio del art. 23 á los bienes adquiridos por herencia ó legado, y que su inscripción perjudicase a los verdaderos sucesores? Nadie habrá que sostenga la afirmativa. Bueno es, y aun necesario para robustecer el crédito territorial, dar eficacia á la inscripción desde que se hace, á fin de que si alguno desea adquirir un inmueble, esté seguro de que la persona con quien contrata es dueño del mismo, pero no por asegurar el crédito, debe prescindirse de sacratísimos derechos. Para proteger los algún tanto, se consignó la excepcion que del principio general establecido en el art. 23 de la ley de 1861, introdujo la de 1869, según la que, la inscripción de bienes adquiridos por herencia ó legado, no perjudica á tercero hasta después de transcurridos cinco años" (V. Res. de 26 Mar., 1889, pages 274, 275).

"Inscrita la herencia, y no transcurridos, el que quiera contratar sobre los bienes que la constituyen, cuidará de cerciorarse de si puede haber otra persona con mejor derecho que la que los tiene inscritos a su favor, y obrará según su prudencia le aconseje; pues la sabe que la irrevocabilidad de su adquisición estriba en que aparesca ó no quien tenga mejor derecho que el heredero á cuyo favor se han inscrito los bienes. Pasados cinco años, ya no tiene necesidad de esas averiguaciones; le basta saber que adquiere de quien tiene inscrito su derecho.

"Si la inscripción de bienes adquiridos por herencia ó legado no ha de perjudicar á tercero hasta que hayan transcurrido cinco años desde su fecha, dicho se esta que tampoco perjudicaran a ese mismo tercero las inscripciones posteriores; por más que ya no sean de herencia, sino de venta, donación, hipoteca etc., porque recibiendo éstas su fuerza de aquélla, no han de surtir mas efecto; pero entiéndase bien, que esto es con relación al tercero que tenga derecho á la herencia, y no á otros terceros. Pondremos un ejemplo que comprenda los dos casos:

"A. inscribe su título de heredero de B.; si dentro de los cinco años se presenta el que lo sea cerdaderamente, no puede perjudicarle aquella inscripción, aunque se hayan transmitido los bienes uno o mas veces sucesivas. A. vende los bienes á C., pero éste no inscribe su derecho, y A. los vuelve á vender á D., quien lo inscribe. Esta inscripción perjudica á C. desde su fecha, porque ya está comprendida en la regla general del art. 23. Tal es, á nuestro juicio, la interpretación de sus dos primeros párrafos (V. Res. de 17 Nov. 1888). * * * (p. 276).

"En resumen: según el art. 23 de la Ley, tal como hoy está redactado, la inscripción perjudica á tercero desde su fecha, exceptuando únicamente la relativa á bienes adquiridos por herederos ó legatarios voluntarios, que no perjudicará á herederos de mejor derecho, sino hasta despues de transcurridos cinco años." * * *

"Si un heredero voluntario posee algún tiempo la herencia inscrita, y luego aparece un nuevo testamento y se declara que la herencia pertenece á otro á cuyo favor se inscribe, los cinco años en que la inscripción de la herencia no perjudica á tercero, ? se han de contar desde la primera, ó desde la segunda inscripción? Indudablemente desde la primera; porque el objeto de la Ley no es que cada heredero tenga

en suspenso su derecho cinco años, sino que el verdadero sucesor goce de este término desde la primera inscripción, para hacer valer el suyo en toda su plenitud y sin menoscabo de ningún género" (page 277). * * *

"Limítase el artículo que comentamos, á consignar los casos en que las inscripciones de herencia, hechas en favor de herederos voluntarios y necesarios, perjudican á otros de mejor derecho, mas no expresa en qué consiste este perjuicio. * * * Para esclarecer estas dudas y las que puedan surgir de la lectura del art. 23, sobre las personas que han de entenderse perjudicadas, expondremos en varios ejemplos nuestra opinión * * * (page 278).

"2. Los contratantes no lo han sido con el testador, sino con los herederos voluntarios. Si la herencia pasa antes de los conco años á otros herederos, no les perjudica á éstos y podrán reclamar contra la enajenación inscrita: si han transcurrido cinco años ya, aquellas ventas les perjudican; es decir, han de pasár por ellas, salvo su derecho á repetir de los vendedores, reputados herederos cuando vendieron, el precio de la cosa enajenada. * * *

"Toda inscripcion de herencia á favor del instituído ó declarado heredero por la ley, lleva envuelta en si implícita ó explícitamente la cláusula derogatoria, 'sin perjuicio de tercero de mejor derecho;' por ello, cuando se cumple esa condición, cuando se declara por convenio ó judicialmente, que ha llegado el caso de existir un heredero de mejor derecho, naturalmente se resuelve el derecho inscrito; sólo quando por el transcurso del tiempo ha desaparecido legalmente la posibilidad de que exista otro heredero de mejor derecho, se hace firme y estable la inscripción primera, respecto á los inscribientes; hasta entonces, no. Los que inscriben en virtud de un testamento revocado, ó de una declaración judicial que se deja sin efecto, inscriben actos nulos con arreglo á las leyes, y su inscripción no los convalida, según el art. 33 de la Hipotecaria" (pp. 279, 280).

Comentarios á la Legislación Hipotecaria de España por Don León Galindo y de Vera y Don Rafael de la Escosura y Escosura. (Cuarta Edición, Madrid, 1899) Tomo II, pp. 274–280.

Translation of the Above.

"Strictly applying the principle of art. 23, the registrar's office might be converted into a medium of frustrating those legitimate rights which, because of special circumstances, could not be exercised at a fixed time, and which the law-maker ought not to leave unprotected. Who can surely aver that a will which is presented for registration as a title of ownership has not been revoked? Who can positively state that those persons declaring themselves heirs *ab intestato* are really those who have the better right to the inheritance? * * * Would it be just, taking into consideration the impossibility of producing legal proof that he who records it is the true heir, to apply the principle of art. 23 to the property acquired by inheritance or legacy, and that its recording should injure the true heirs? There will be none to sustain the affirmative. It is convenient and even necessary to strengthen the territorial credit, to give efficacy to the registration from the time it is made, in order that if any one desire to acquire real estate he may be sure that the person with whom he contracts is the owner of the same, but not even to make our credit secure should the most sacred rights be set aside. In order to protect them somewhat there was inserted the exception put in the law of 1869 from the general principle established by said art. 23 of the law of 1861, according to which exception the registry of property acquired by inheritance or legacy will not prejudice third parties until five years have elapsed. (See res. of March 26, 1889.)

"When the inheritance has been recorded and the above time has not elapsed, he who desires to contract for property pertainmg thereto will take care to ascertain if there can be another person with better right than he who has the property recorded in his name and will act as his prudence may counsel him, as he already knows that the validity of his purchase depends upon whether there should or not appear one who has a better right than the heir in whose favor the property is recorded. After the five years have elapsed there is no necessity for such investigation; it is enough to know that he from whom he acquires has the property recorded in his favor.

"If the registration of property acquired by inheritance

or legacy is not to injure a third party until five years may have elapsed from its date, it is evident that subsequent registrations likewise will not injure this third party, even if they should not be of inheritance but of sale, donation, mortgage etc., because if the latter get their force from the former they cannot have greater effect; but it must be understood that this *applies to the third party who may have a right to the inheritance and not to other third parties.* We will give an example which includes both cases:

"A. records his title as heir of B.; if within the five years he who is the true heir presents himself, that record cannot prejudice him even though the property may have been transferred one or more times successively. A. sells the property to C., but the latter does not record his title, and A. sells the property over again to D., who does record his title. This record is prejudicial to C. from its date, because it is already included in the general rule of art. 23. Such is in our judgment the meaning of its first two paragraphs. (See resolution of Nov. 17, 1888.) * * *

"To sum up: In accordance with art. 23 of the law, as it reads today, the inscription or record prejudices third parties from its date, excepting only in so far as it relates to property acquired by voluntary heirs or legatees, which will not prejudice those heirs having a better right until after five years have passed. * * *

"If a voluntary heir has for some time had his inheritance recorded and then there appears a new will and it is declared that the inheritance belongs to another, and it is recorded in the latter's favor, do the five years within which the record on the inheritance does not prejudice third parties begin to run from the first or from the second inscription? Undoubtedly from the first; because the object of the law is not that each heir should have his right suspended for five years, but that the true heir may enjoy that period from the first inscription *in order to make good his own right in all its fulness and without diminution of any kind.* * * *

"The article upon which we are commenting limits itself to the statement of those cases in which the recording of the inheritance, made in favor of voluntary and necessary heirs, prejudices others having better rights, but it does not state in what this prejudice consists. * * * In order to clear up these doubts and those which may arise from the

reading of art. 23 touching those persons to be considered as prejudiced, we will explain our opinion by several examples: * * *

"2nd. The contracting parties have not contracted with the testator but with the voluntary heirs. If the inheritance passes to other heirs before the five years have elapsed, the latter are not prejudiced in their rights and *they can claim against the recorded sale;* if five years have already elapsed, those sales do prejudice them; that is to say, they will have to recognize such sales, saving their right to demand from the vendors, who were reputed as heirs when they sold, the price of the alienated property. * * *

"Every recording of a right of inheritance in favor of one made or declared an heir by the law carries included within itself, impliedly or expressly, the limiting clause 'without prejudice to a third person of better right;' in consequence thereof, when that condition comes about, when it is declared either by agreement or judicially that there has arrived the case of an heir with better right existing, naturally the right recorded is destroyed; only when by the passing of time the possibility of the existence of another heir of a better right has legally disappeared, the first inscription, touching rights inscribed, is made final and stable; until then it is not so. Those who make a record by virtue of a will which has been revoked, or of a judicial declaration which is held to be valueless, record instruments which are null under the law, and their inscription does not validate them, as is provided by art. 33 of the mortgage law."

It clearly appears from the record that the payment of the *last* installment of the debt in controversy was made by defendant in error on or before May 16, 1896 (Record, pages 35–36), which was not only less than five years after the declaration of Belen Sixto as heir by the court, but also less than five years from the death of Manuel Sixto. Hence, if the commentator is right in his view of the law, *none* of the payments were protected by the *ex parte* declaration of heirship or the recording of the same.

The law made a distinction between *necessary* and *voluntary* heirs (as the two words have been translated). To

designate the former class, the Spanish law uses interchangeably the words "forzozos" and "necesarios," meaning thereby the wife and legitimate children from whom the father could not entirely alienate his estate by will—in other words, those whom the law *forced* a testator to provide for. Voluntary heirs, on the other hand, were those inheriting either by the *will* of the party or by legal proceedings instituted for their benefit. Clearly those declared heirs *ab intestato* belonged to the latter class, as that proceeding was called a "proceeding of voluntary jurisdiction" (Record, page 17, bottom).

We therefore submit that the charge of the court, which supported the contention of defendant that the first payment was made under an order of court, which protected defendant in its payment and cut out any claim of plaintiff except to recourse against the other heir, was based upon an erroneous view of the law, and that, in its place, the judge should have charged in accordance with the view set forth in plaintiff's request, which is the subject of the ninth assignment of error.

And we call to the attention of the court that this decree, which was "without prejudice to third parties," lies at the basis of the right claimed as to all the subsequent payments. Hence the argument and conclusion must apply to those payments as well, unless some independent defense invalidates them.

2d. As to the second payment. The testimony in support of the plea was, first, the oral statement of defendant, as follows: "The second installment, which was to fall due in May, 1894, I paid to Belen Sixto about the first of April, 1894, which payment was solemnized by a notarial act whereby the property mortgaged might be relieved from the lien of the first two installments" (Record, page 33), and, second, the copy of said notarial act, dated April 4, 1894 (Record, pages 33 and 34 [5]).

The declaration of heirship in her favor was made on November 21, 1893, and the assets in the hands of the "administrator" ordered turned over to her on the 25th of the same month, at which time, according to section 1001 of the Code of Civil Procedure (hereinbefore quoted), the "judicial intervention ceased." Hence there were no legal proceedings pending by virtue of which he could claim to be *obliged* to pay this installment. Moreover, the notarial act recites (paragraph 5) that "she has also agreed with Don Laureano Sarria that he shall pay her the second installment, *about to fall due*," etc. But the evidence further shows that on the very same April 4 the plaintiff was filing in the Humacao court his "contentious proceeding," in which the notice was soon to issue to Sarria which would make it impossible for him to pay over the money to Belen Sixto—which sufficiently shows why the time of payment was anticipated.

There is nothing in the record except the certificate of the registrar (which we claim was improperly admitted) to show that at that time even the decree of heirship had been recorded in the registry. We submit that this second payment was entirely voluntary, made in face of a decree expressly reserving the rights of third parties, anticipated in point of time for a fraudulent purpose, and in no way constituted a defense to plaintiff's demand for repayment to him as to his one-half part.

We therefore insist that the charges given by the court were erroneous, and that the charge requested by the defendant as to these two payments should have been given.

V.

The seventh assignment of error is to a charge of the court to the jury in the following language:

"A suit was brought by Adolfo Sixto on April 4, 1894, against Belen Sixto in order to have his right also as an heir declared. The debtor for this purchase-money, Sarria, had no notice of this suit until June 5, 1894, and that was after

two payments had been made, Belen Sixto having had the right to collect them."

The last clause of this charge involves the same point discussed under the previous subdivision of this brief, and we refer to that argument. But we submit that there was also error in charging positively that Sarria had no notice of plaintiff's contentious suit until June 5, the date on which the court notice was served on him.

The plaintiff had testified that he knew the defendant long before his father's death, and that defendant knew he was the son of Manuel Sixto. The evidence further showed that plaintiff began his original suit in the court of first instance of Humacao on the day before Belen Sixto obtained from the same court the decree declaring her to be sole heir, in which proceeding defendant had deposited the first installment; that plaintiff's suit, in which Belen Sixto appeared and made opposition on the same day she received her decree, continued until it was changed to a contentious suit on April 4, 1894, on which very day the defendant, by agreement with said Belen, anticipated the payment of the second installment, which did not become due and payable until the 15th of the succeeding May, and that in his petition in this contentious suit plaintiff *asked for* the process against Sarria which afterwards issued for the purpose of preventing these payments.

Upon this evidence we contend that the judge should have left to the jury the question whether Sarria did not have some notice or knowledge of plaintiff's claims and his pending effort to enforce them, instead of positively instructing them that Sarria had no notice thereof at the time of the second payment.

VI.

The eighth and tenth assignments may be considered together. The eighth excepted to a charge given to the jury in the following language:

"In this contentious suit by Adolfo Sixto against Belen this defendant Sarria was ordered on June 2, 1894, to pay into court whatever money he might be owing. That order was served on Sarria on June 5, 1894, and afterwards that court decided that Sixto, the plaintiff in this suit, was not entitled to attach this money. He obtained an appeal from that judgment, but not from that portion of it that canceled the annotation made in the registry of deeds of the attachment of that fund. Subsequently, on November 27, 1894, an appeal was allowed in the upper court from that portion of it, but no notice was given as to Sarria, who was merely a garnishee in the suit, and who had received no notice not to pay over the money until the lower court decided whether he had the right to pay it over. Between the time the court decided the attachment and the time the appeal was allowed in the upper court, Belen Sixto assigned to Roig the third and fourth installments. I say to you as a matter of law that there was nothing to hinder her from doing that at that time; she had in law the right to do it."

The tenth excepted to the refusal of the judge to charge the jury at the request of plaintiff as follows:

"As it is shown by the uncontradicted evidence that the judge of the court of first instance of Humacao was entirely without authority or jurisdiction to issue his order on August 31, 1894, directing the registrar to make annotation on his books of said order, said order to the registrar was void and the annotation made by the registrar was void and the former annotation remained in force, which was notice to all the world including this defendant that the plaintiff had an interest in those payments such as might be declared by the court; and the court having afterwards decided that the plaintiff here is entitled to a one-half interest in said estate, the plaintiff is now entitled to recover one-half of the last two payments, with interest."

Irrespective of questions of law, the charge above quoted was erroneous and prejudicial to plaintiff in error because it grossly misstated the facts in proof, and thereby misled the jury in the following particulars:

1st. The charge says that "he (plaintiff) obtained an appeal from that judgment, but not from that portion of it that canceled the annotation made in the registry," and that *subsequently* an appeal was allowed in the upper court from that portion of it.

The record shows (page 19, bottom, and 20) that plaintiff's appeal was duly allowed "in due time and form" from the whole order, but for *one effect* only, and the subsequent action of the appellate court was not to *enlarge* the appeal as to the matter covered by it, but to *better* it by ordering it to be given *both effects*, and the wording of said order was that it "be considered as having been taken" for both effects.

The difference between the allowance of an appeal for one effect and for both effects is explained by the definition of each given by article 383 of the Code of Civil Procedure (382 in that of Porto Rico), which is as follows:

"383. Las apelaciones podrán admitirse en ambos efectos ó en uno solo. Se admitirán en un solo efecto en todos los casos en que no se halle prevenido que se admitan libremente ó en ambos efectos."

The following article shows that the question of allowance in one or both effects is not a matter of discretion, but of absolute right:

"384. Además de los casos determinados expresamente en la ley, se admitirán en ambos efectos las apelaciones que se interpongan: 1° De las sentencias definitivas, etc. * * * 3° De losautos y providencias que causen perjuicios irrep-a ble en definitiva."

The War Department translation of the above articles is as follows:

"382. The appeals may be allowed for a review only, or for a review and stay of proceedings also. They shall be allowed for review only in all cases in which it is not prescribed that they be allowed without limitation or for a review and stay of proceedings also.

"383. In addition to the cases expressly mentioned in the law, the following appeals shall be allowed for review and for a stay of proceedings: 1. Appeals from definite judgments, etc. * * * 3. Appeals from rulings and orders which cause definite and irreparable injury."

And it was under this last subdivision that the appellate court held our petition for appeal to have been wrongfully acted upon in not giving it both effects, and ordered it "considered as having been so taken."

This erroneous impression of the court, so impressed by his charge upon the minds of the jury, was highly prejudicial to plaintiff, because the court followed it up by saying in the same paragraph: "Between the time the court decided the attachment and the time the appeal was allowed in the upper court, Belen Sixto assigned to Roig the third and fourth installments." If these had been the actual facts the order of cancellation might have become final (firme), and the legal conclusion of the judge correct.

2d. The charge says, "Subsequently, on Nov. 27, 1894, an appeal was allowed in the upper court from that portion of it (meaning the portion which canceled the annotation), but no notice was given as to Sarria, who was merely a garnishee in the suit, and who had received no notice not to pay over the money until the lower court decided whether he had a right to pay it over." On the contrary, the record evidence showed that Sarria was notified directly by the audiencia on January 8, 1895, and again on February 8, 1895 (Record, pages 22 and 24). The latter notice was ordered because Sarria claimed not to understand the purport of the first one, and the officer serving the same showed Sarria the

order which said: "explaining to him that the requisition referred to in the attached communication is a ratification of that one made to him on the 2nd of June, *until the pending appeal is decided*," and the audiencia never modified that requirement. But afterwards, although the audiencia had on November 29, 1895, sustained plaintiff's appeal, the *lower court* arrogated to itself the authority to ignore this order of the audiencia, and on the *25th of April, 1896*, upon the petition of Sarria, allowed him to withdraw the third installment, which he had once deposited in obedience to the order of June 2, 1894 (Record, page 35), and then he paid it over to Roig. Thus it appears that the judge vitally misled the jury as to the facts which had been proven.

But we further contend that, under the facts as proven, this charge erroneously stated the law. We contend that after the service of what might be called the "garnishment notice" upon Sarria on June 2, 1894, he was never for a moment free to pay either of the last two installments until the suit between Adolfo Sixto and Belen Sixto was finally decided. We have already shown that the audiencia, before he made any payment, ordered him to hold the money to abide the result of the suit, which order never was rescinded. But we contend further that the original annotation *never was validly and legally canceled*, so that at no moment was Belen able to transfer her rights in those installments, except subject to whatever claim Adolfo might finally be decided to have.

Let us bear in mind the dates. The registrar made the annotation under the order of June 2 on June 12, 1894 (Record, page 19). The court of first instance made its order to annul the annotation on August 30, 1894, and the order to the registrar to carry out the annulment (such an order being called "ejecutoria") was signed August 31, 1894. The plaintiff's procurador was notified of the order on the same day, and on the third day thereafter (September 3, 1894) filed his petition for an appeal with both effects

(Record, pages 19 and 20), which was afterward admitted by the judge to have been presented "in due time and form." The judge allowed the appeal for one effect only, but within the proper time plaintiff appealed from that ruling and the audiencia reversed it and ordered that it "be considered as *having been taken* for both effects." The order was so worded because such allowance was a matter of *right* and not of *discretion*, as we have shown by previous citations.

1st. We contend that the "ejecutoria" issued to the registrar was void because issued before the legal time, and therefore that any action taken by him thereunder was void.

Article 82 of the mortgage law provides as follows:

"Las inscripciones ó anotaciones preventivas, hechas en virtud de escritura publica, no se cancelarán sino por providencia ejectoria contra la cual no se halle pendiente recourso de casación, ó por otra escritura ó documento auténtico, en el cual exprese su consentimiento, para la cancelación, la persona á cuyo favor se hubiere hecho la inscripción ó anotación, ó sus causa habientes ó representantes legitimos. * * * * *

"Las inscripciones ó anotaciones hechas en virtud de mandamientos judiciales, no se cancelarán sino por providencia ejecutoria que tenga las circumstancias prevenidas en el parrafo anterior," etc.

(*Translation.*)

"The records or cautionary notices made by virtue of a public document cannot be canceled except by a *final decree* from which there is no appeal in cassation pending, or by any other authenticated instrument or document, in which the person in whose favor the record or entry has been made, or his legal representative or attorney, signifies his consent to the cancellation. * * *

"The records and entries made by virtue of judicial decrees may only be canceled by a *final decree*, in which the facts provided by the first paragraph of this article appear."

When does an order or decree (providencia) become final (ejecutoria)? Any order or decree must become "firme" before it can be "ejecutoria." Article 368 of the Code of Civil Procedure shows this when it says, in defining the various terms of procedure:

"Ejecutoria, el documento publico y solemne en que se consigne una sentencia *firme*" (the public and formal instrument in which a final judgment is entered for enforcement).

When, then, does such an order or decree become final in the sense of "firme"? Article 390 of the same Code contains the following provisions:

"No se suspenderá la ejecución de la sentencia, auto ó providencia apeladas, cuando haya sido admitida la apelación en un solo efecto. * * *

"El apelante deberá solicitar dicho testimonio dentro de cinco días, expresando los particulares que deba contener. Transcurrido este término sin haberlo solicitado, se le negara el testimonio y se tendra por *firme* la resolucion apelada."

(*Translation.*)

"The execution of the judgment, ruling or order appealed from shall not be suspended, when the appeal has been allowed for a review of the proceedings only. * * *

"The appellant must request said copy within five days, stating the details it should contain. Upon the expiration of this period without having requested it, the said statement or copy shall be denied him and the decision appealed from shall be considered *final*."

The supreme court of Spain has construed these provisions by holding, in its decision of January 16, 1885, that the order or ruling does not become *final* until the expiration of the five days.

Jurisprudencia Civil, vol. 57, page 65 (cited in note to art. 390, Code of Civil Procedure).

In the " Real Academia Espanola Dictionario de la lengua Castellana " (Royal Spanish Dictionary) are found the following definitions, described as " forensic " use : " Sentencia firme—La que por no ser apelable ó por haberla consentido las partes, causa ejecutoria " (final decree—one which, by not being appealable or by having the consent of parties, can be executed). Also the following definition of " ejecutoria "—Despacho que se libra por los tribunales de las sentencias que pasan en autoridad de cosa juzgada" (the certificate which is issued by the courts of those sentences which have become *res judicata*).

The supreme court of Spain has decided that a decree is not *res judicata* so long as an appeal is pending from any part of it.

> Decision of January 11, 1876, Juris. Civil., vol. 33, page 121 (cited in note to art. 387 of Code of Civil Proced.).

We submit, therefore, that the order to the registrar was issued improvidently and prematurely and was void ; hence its record was void according to article 33 of the mortgage law hereinbefore cited.

2d. We further contend that, even if the cancellation of the cautionary notice of June 2, 1894, was not absolutely void, yet the reference therein to the pendency of this suit, following an annotation previously duly entered, put all parties dealing with the property covered by said annotation on notice of the infirmity of Belen Sixto's title, and they were bound at their peril to investigate its regularity, and such dealings were necessarily subject to what might be thereafter decreed in said suit with respect to that annotation. In other words, that when Roig bought (as is claimed) the third and fourth installments, on September 11, 1894, he was put on notice by the entry and the pretended cancellation that the ownership of those installments was in dispute and that the order of cancellation had been irregularly issued ;

that it was then his duty to investigate the status of that suit to see if he could safely buy; that, if he had done so, he would have seen from the record therein that the order of cancellation had been appealed from, said appeal being prayed for in both effects, and a further appeal taken from the order allowing it in only one effect, all of which had been done on or before September 6, 1894, and that, if he then bought, he bought with whatever burden might result from the suit.

We therefore submit that Roig could only have bought this debt subject to the rights which Adolfo Sixto was afterwards in said suit adjudged to have. If this be true under the law as to Roig, much more must it be true as to Sarria, the defendant in error, who not only had what notice the registry would give him, but also had been brought into the suit as a party and ordered to hold this very money to await its final result. The order of cancellation did not affect his liability. Article 97 of the mortgage law reads as follows:

"The cancellation of the records of cautionary notices does not in and of itself extinguish, with regard to the parties, the interests recorded which it affects; but when it has been made without any apparent cause for annulment, such as those mentioned in the following article, it shall have all its effects with regard to third persons, who, by reason thereof, may have acquired or recorded any interest, although later it is annulled for some reason which does not clearly appear from the said record of cancellation."

That Sarria was to be regarded as one of the parties and not as a "third person," so far as this annotation is concerned, is shown by article 27 of the same law, which reads as follows:

"For the purposes of this law, those who have not participated in the recorded instrument or contract shall be considered as third persons."

The Spanish word translated "instrument" is "acto," which in judicial proceedings is used as synonymous with "auto" or "proceeding." When Sarria was summoned to hold this money by judicial order he became a party to the proceeding.

As to whether a party dealing with property affected by judicial proceedings is bound to take notice of the irregularities thereof, the decision of this honorable court in the case of Patterson *vs.* Gaines, reported 6 How., 550, is very instructive. In that case the validity of sales made under pretense of judicial authority was somewhat involved, and the effect of their invalidity upon subsequent purchasers, and touching that subject the court says (at page 601):

"Under these decisions, and the view which we have taken of this point of the case, the fact of notice by the purchasers, and by the defendant from them, of the illegal and fraudulent sale, cannot be denied. The defendant knew, from the titles which he received from the purchaser, Correjollas, and from that bought by him from the other alienee of Correjollas, that the sales had been made by Mr. Relf and Mr. Chew in a representative character, and it was his duty to inquire if they legally filled it. Not having done so, he has bought in his own wrong, and the title by which he claims the property must be annulled. We have confined our remarks strictly to the objection, that these sales were made by *the donee, or universal heir of the will*, without," etc."

We submit, therefore, that the charge of the court was wrong in respect to the rights of our client, and that such charge should not have been given, while the charge requested by us should have been given as correctly expressing the law on the point involved.

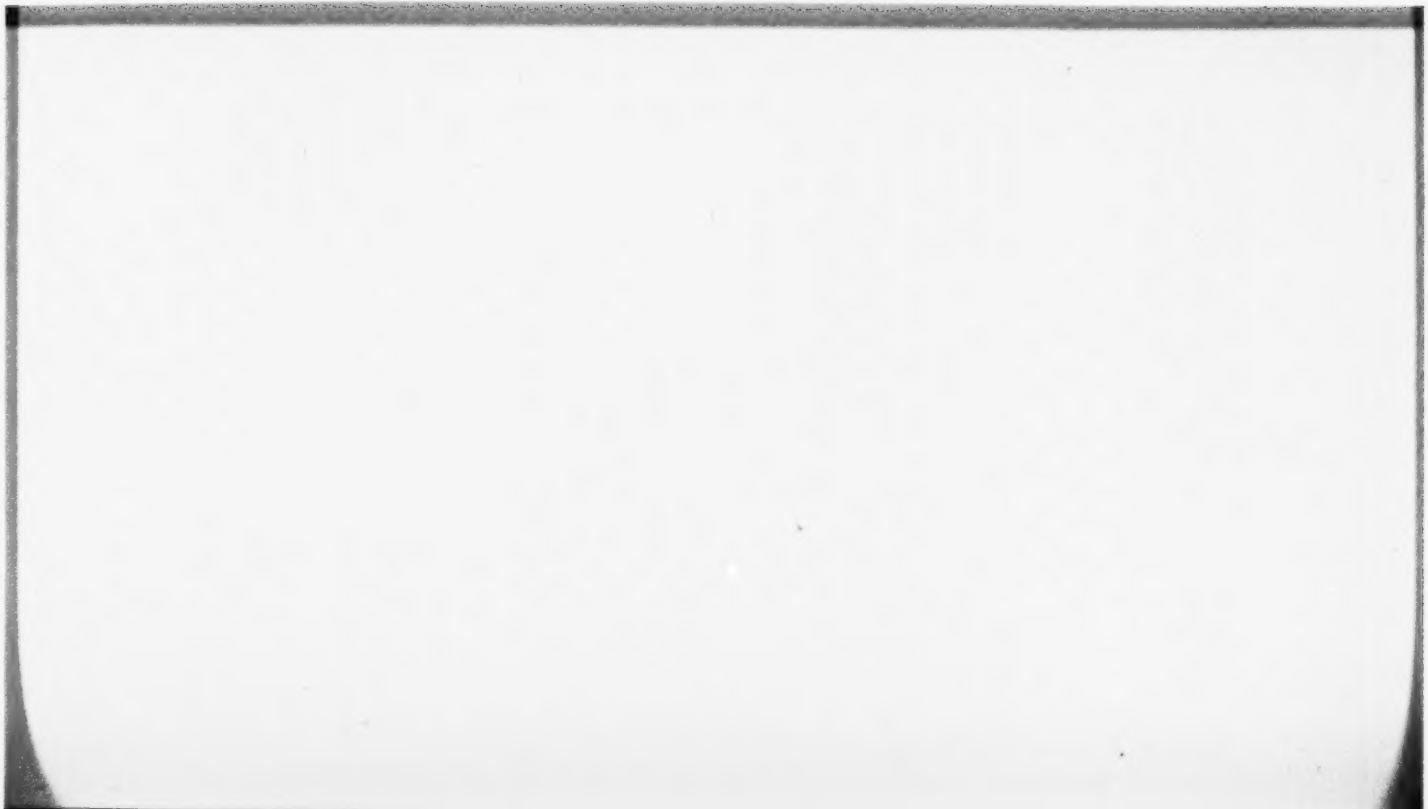
It is true that literally all the judge said was that "there was nothing to hinder her from doing that (*i. e.*, selling the installments) at that time," and under article 71 aforesaid of the mortgage law she might have transferred them, but *cum*

onere. While what the judge clearly meant, and what the jury must necessarily have understood him to mean, was that she could then transfer them *free* from any claim or right of plaintiff in error to any part thereof.

VII.

We therefore submit that each and all of the errors assigned in this case are well taken; that the commission of these errors led to a wrong verdict and judgment, and that said judgment should be reversed and the case remanded to the court below for a new trial.

Very respectfully, N. B. K. PETTINGILL,
Attorney for Plaintiff in Error.



Supreme Court of the United States.

No. 40.—October Term, 1904.

Adolfo Sixto, Plaintiff in Error, *vs.* Laureano Sarria. } In error to the District Court of the United States for the District of Porto Rico.

[January 3, 1905.]

This is a writ of error bringing in review the proceedings of the District Court of the United States for the District of Porto Rico.

The original action was in assumpsit brought by Adolfo Sixto, an alien, and a subject of the King of Spain, against Laureano Sarria, a citizen of Porto Rico. The declaration set forth in substance:

That on November 27, 1892, the defendant was indebted to one Manuel Sixto, since deceased, in the sum of $16,000, Spanish money, with interest from May 15 of the same year, which sum said Sarria had promised to pay in four annual installments, falling due respectively on the fifteenth day of May of each and every year from 1893 until 1896, inclusive. That the said Manuel Sixto departed this life on November 27, 1892, leaving two children, plaintiff and one Maria Belen Sixto Melendez, as his heirs at law. That as such heir the plaintiff was entitled to one-half of the indebtedness of $16,000, Spanish money, with interest at the rate of eight per cent from May 15, 1892. The declaration contained the usual averments in assumpsit of promise and default. The defendant filed a plea and amended plea to this declaration which set up the general issue, and for further plea averred:

"And for a further and second plea to the said declaration, the defendant says that on the fifteenth day of May, eighteen hundred and ninety-two, the defendant became indebted in the sum of sixteen thousand dollars (16,000) Mexican dollars, money then current in Porto Rico, to one Manuel Sixto, on account of the purchase price of a farm situated in the island of Vieques, district of Porto Rico, and called 'Monte Santo;' that on the said fifteenth day of May, eighteen hundred and ninety-two, the defendant made and constituted a mortgage upon the said farm in favor of the said Sixto, as security for the payment of the aforesaid amount of sixteen thousand (16,000) Mexican dollars, together with a certain interest as stipulated in the said instrument of mortgage; that thereafter the said mortgage was duly registered in the registry of property of Humacao, Porto Rico, on the eleventh day of July, eighteen hundred and ninety-two; that the payment of the aforesaid sum of sixteen

thousand (16,000) Mexican dollars, as provided for in the said instrument of mortgage, was to be made in the manner following, to wit: four thousand (4,000), dollars on the fifteenth day of May, eighteen hundred and ninety-three, and four thousand (4,000) dollars on the fifteenth day of May, of the years eighteen hundred and ninety-four, eighteen hundred and ninety-five, and eighteen hundred and ninety-six. And the defendant further says that the aforesaid Emanuel Sixto departed this life on the twenty-seventh day of November, eighteen hundred and ninety-two, before any of the installments aforesaid had fallen due; that the said Sixto died intestate, and soon after his death, to wit, in the year eighteen hundred and ninety-three, judicial proceedings touching and respecting the settlement and inheritance of the estate of the said Manuel Sixto, deceased, and which said proceedings are known in the law of Porto Rico as 'proceedings *ab intestato*,' were instituted in the court of first instance of Humacao, Porto Rico, the said court being then and there a court of record and of general jurisdiction, and the said court in said proceedings by a decree dated the fifteenth day of June, eighteen hundred and ninety-three, ordered the said defendant to pay into and deposit with the said court all sums of money then due by the said defendant to the said estate of the said Manuel Sixto, deceased, by virtue of the aforesaid mortgage, and the defendant thereupon and in obedience to the said order of the said court did on the twenty-second day of June, eighteen hundred and ninety-three, consign and deposit with the said court and did place at the disposal of the same the sum of four thousand (4,000) pesos of the money then current in Porto Rico, and the further sum of eight hundred twenty-two and fifty-two hundredths (822.52) dollars of the same kind of money, the first sum being the amount of the first installment due May fifteenth, eighteen hundred and ninety-three, and the second sum being the interest due on the aforesaid mortgage credit up to the first of June, eighteen hundred and ninety-three. And the said decree of the said court was duly entered before the commencement of this action and still is in full force and effect.

"And the defendant further says, as to the third installment above mentioned, that by judgment of the Supreme Court of Porto Rico, then known as the 'audiencia territorial,' dated the eighteenth day of February, eighteen hundred and ninety-six, rendered and entered in certain foreclosure proceedings had before the said court on appeal from the court of first instance of Humacao, in which proceedings the defendant and one Antonio Roig y Torruellas were plaintiffs, and which said proceedings the said Roig, as owner of the third and fourth installments of the mortgage before mentioned, sought to foreclose the same to the extent of the third installment aforesaid, together with certain interest, the defendant was found to be indebted to the said plaintiff, Roig, in the amount of the third installment aforesaid, together with the corresponding interest, and was ordered to pay the amount of said indebtedness so found due by the said judgment to the said Roig within the period of thirty days thereof, and the said judgment further provided for execution to issue upon the non-compliance with the terms thereof by the defendant. Said judgment was duly entered before the commencement of this suit and is still in force and effect. And the said defendant thereupon and in compliance with the said judgment of the said court thereafter paid unto the said plaintiff, Roig, the amounts ordered to be paid by

the said judgment, to wit, the amount of the third installment of the aforesaid mortgage, together with the corresponding interest. And all of this the defendant is ready to verify."

The additional or amended plea sets forth:

"And the defendant as to the second installment aforesaid says that he has paid the same, together with the corresponding interest, on the 4th day of April, 1894, to one Belen Sixto, who was then the record owner of said mortgage credit, and who had previously been declared heir *ab intestato* of said Manuel Sixto, deceased, by the order and decree of the proper court, to wit, the court of the first instance of Humacao, respectively on the 21st and 23d of the month of November, 1893.

"And as to the third and fourth installments the defendant says that on the 11th day of September, 1894, the aforesaid Belen Sixto, for a valuable consideration, ceded and transferred the said two installments to one Antonio Roig y Torruella; that thereupon the said transfer was duly recorded and the said two installments appeared upon the record to be the property of the said Roig, and thereupon, to wit, on or about the 16th day of May, 1896, the defendant paid the said Roig the amount of said two installments, together with all interest due."

The bill of exceptions brings into the case the testimony and the rulings and charge of the court. The facts developed are: Manuel Sixto sold a farm to the defendant Sarria for $16,000.00 Mexican money, payable in four equal installments with interest. A mortgage was taken upon the property to secure the payment of the purchase price. Manuel Sixto y Andino died November 27, 1892, leaving no issue except two natural children, a daughter by the name of Maria Belen Sixto y Melendez, (hereinafter called Maria Belen,) who lived in Vieques, and the plaintiff in error, a son, who lived in the island of St. Thomas. After the death of Manuel Sixto, the daughter, Maria Belen, filed her petition in the court of first instance of Humacao, Porto Rico, alleging that she was the only heir of Manuel Sixto, deceased, and praying the court to declare her heir *ab intestato* according to the provisions of section 980 and following of the Code of Porto Rico then in force. Upon June 22, 1893, the defendant in error, Sarria, paid into court, where the petition of Maria Belen was then pending, the first instalment due, with interest. On November 21, 1893, Maria Belen, by decree of the court, was adjudged heir *ab intestato* of Manuel Sixto, without prejudice to the rights of third parties. On the 25th of the same month the assets received by the administrator of Manuel Sixto, who had been appointed during the proceeding, and the money paid into court by defendant in error, by order of the court were made over to Maria Belen as sole heir *ab intestato*. On November 24, 1893, the plaintiff in error, Adolfo Sixto, presented to the same court of first instance his petition to be declared the heir of Manuel Sixto, deceased, (jointly entitled with Maria Belen,) invoking the exercise by the court of "voluntary juris-

diction" under the section of the code whereby Maria Belen had been adjudged heir. To this petition Maria Belen answered, alleging that she had been duly declared the only heir of Manuel Sixto, and that the plaintiff in error could only contest her right by a "contentious suit" (*expediente contensioso*).

The court sustained this contention, and Sixto appealed, but later abandoned the appeal, and on April 4, 1894, began a suit in the form of a contentious proceeding, making Maria Belen a party defendant, and praying the court to declare him (Adolfo Sixto) an equal heir with her in the estate of Manuel Sixto, and asking the court to issue an order to the registrar of property, requiring him to make a cautionary entry in the register concerning the property affected by this suit, and also requiring the defendant in error to retain, at the disposition of the court, the sums still owing to the estate of Manuel Sixto. On June 2, 1894, a notice was accordingly issued to Sarria and one to the registrar. The one to Sarria was issued on June 5, 1894, and the one to the registrar on June 4, 1894. The defendant, Maria Belen, being notified of these orders, on June 26, 1894, answered the plaintiff's petition, and in her answer prayed that the interlocutory order of June 2, 1894, be vacated and the notices cancelled. On August 30, 1894, the prayer of defendant's answer was granted by the court, and orders issued accordingly to the registrar and to Sarria, and notice was given to the solicitor of the plaintiff. On September 1, 1894, the order reached the registrar, and the order of cancellation was made on the books on September 3, 1894. On September 3, 1894, the plaintiff filed a petition for an appeal from the court's order of August 30, 1894, praying that it be allowed "in both effects," that is, (Code, sec. 383,) with the effect of a review and stay of proceedings, but the judge granted the same with one effect only, that is, for a review of the judgment. In the appellate court, on November 17, 1894, that court held that the allowance of both effects had been wrongfully denied, and ordered that the appeal be considered as having been taken for both effects. On December 22, 1894, the appellate court granted a further order, that Sarria, the defendant in error, be notified of his obligation under the decree of June 2, 1894, which order was accordingly issued. On November 29, 1895, the appellate court (audiencia) rendered its decision on the merits of the appeal, and reversed the order of August 30, 1894, and reaffirmed the order of June 2, 1894, in its validity and regularity. The court used the following language:

"That which was ordered in the decree appealed from regarding Mr. Laureano Sarria is hereby set aside, leaving in force the requisition ordered and directed to said Sarria on June 2 by the judge of first instance until the resolution of the pending appeal."

This decision was certified to the court below in January, 1896, and in March following the solicitor of the plaintiff requested the court to notify

Sarria and the registrar that the order of June 2, 1894, was still in force, which was accordingly done, and the defendant in error made reply thereto as follows:

"Having received notice that the installment of the mortgage had been transferred to Mr. Antonio Roig, who has recorded said transfer in the registry of property, and supposing that he will proceed to collect the same judicially as he did the previous installment, he is unable to accept the notification, and he will appear before the audiencia in the premises."

The registrar refused to comply with the order for these reasons: "First, because subsequent to the illegal cancellation of the cautionary notice the property as well as the encumbrance had been transferred on the registry; and, second, because the mortgage law contained no provision regarding the form of carrying into effect such an order." Thereafter the plaintiff asked the court for a further order to the registrar, but this was denied.

The case proceeded to proof and argument, and on December 15, 1896, a final decision was rendered, adverse to the plaintiff, from which decree he took an appeal, which was allowed "in both effects." The appeal was also allowed from the order denying a further order to the registrar. On February 2, 1897, the appellate court consolidated the appeals and ordered the suspension of further proceedings until final decision.

In the meantime, on April 26, 1896, by an order of the court of the first instance, Sarria was allowed to withdraw his deposit of the third installment. The order recited that one Roig had become the purchaser from Maria Belen of the third and fourth installments, and had recovered judgment in the audiencia against Sarria for the third installment, and found that Maria Belen had the right to transfer these installments, and ordered a copy of the decree to be placed in the records by the actuary.

Thus the matter remained until after the conclusion of the war with Spain, resulting in a change of sovereignty of Porto Rico.

By the military government, an order was issued abolishing the territorial audiencia, the appellate court aforesaid, creating in its place the District Court of San Juan. On September 29, 1899, that court rendered its final decision upon both appeals, reversing the action of the court below, and deciding the plaintiff to be legally proved the heir of Manuel Sixto. The trial in the United States District Court in the present suit resulted in a verdict and judgment for the defendant.

Mr. Justice DAY delivered the opinion of the Court.

It is evident from the foregoing statement of facts that the controversy, as it appeared in the United States District Court, was resolved into the

question whether Adolfo Sixto, who had been duly adjudged the co-heir with Maria Belen of Manuel Sixto, deceased, was entitled to recover one-half of the amount due on the mortgage debt which the defendant Sarria claimed to have discharged by legal payments. The recovery sought was for one-half of the four installments of purchase money due respectively on the fifteenth day of May in the years from 1893 until 1896, inclusive. The defendant interposed different defences to different installments of the debt. We will proceed to consider them, together with the charge and rulings of the court concerning the same.

Referring to the first and second installments, we find it to be the contention of the plaintiff in error that Maria Belen, having been adjudged heir *ab intestato* under a decree which expressly reserved the rights of third parties, no payment could have been lawfully made to her as against the rights of the plaintiff in error, and that if any such payment was made it was subject to the risk that the subsequent established rights of the plaintiff in error might entitle him to recover from Sarria one-half of such payments. Upon this subject the court charged the jury:

"On February 15, 1894, she [Maria Belen] having been declared the heir, the entry was made of that fact in the registry (of property.) I say to you as a matter of law, that that declaration of her heirship was without prejudice to the rights of third parties—and that meant that if any other person showed himself afterwards to be an heir he was entitled to a proper proportion of the estate, but so far as a collection of debts, and so far as a proper attention to the assets were concerned and the control of them, she became entitled to attend to that."

Upon the same subject the plaintiff in error had requested the court to charge:

"As the *ex parte* decree declaring Belen Sixto the heir of Manuel Sixto expressly saved the rights of third parties, that was notice to the defendant that any payment made to her was made at his peril as against the other true heirs; and, as defendant was not required by any legal authority to pay the first two payments to Belen Sixto, and as the plaintiff is shown in truth to have been an equal heir with Belen Sixto, the plaintiff is entitled to recover one-half of those two payments."

So far as this contention is concerned, we think the court below was right. The sections of the Code of Porto Rico, (War Department translation,) under which Maria Belen was declared the heir *ab intestato* of Manuel Sixto, are as follows:

"976. After the measures indispensable for the security of the property prescribed in the foregoing section have been taken, and without prejudice to including in the same proceedings the making of the inventory, the designation of heirs *ab intestato* shall be proceeded with in a separate record.

"977. This designation may also be made at the instance of the interested parties, without the necessity of previously taking the steps men-

tioned, in cases in which they are not necessary and in which the institution of intestate proceedings is not requested.

"978. Heirs *ab intestato*, who are descendants of the deceased, may obtain a declaration of their rights by proving, with the proper documents or with the evidence obtainable, the death of the person whose estate is in question, their relationship to the same, and with the evidence of witnesses that said person died intestate, and that they, or the persons whom they designate, are his only heirs.

"The services of a solicitor or attorney are not necessary in order to present this claim.

"979. The deputy public prosecutor shall be cited to appear at said proceeding, to whom the record shall afterward be referred for the period of six days for his report thereon.

"Should he find the proof insufficient, a hearing shall be granted to the interested parties in order that they may cure the defect.

"When the deputy public prosecutor requests it, or the judge considers it necessary, the documents presented shall be compared with the originals.

"980. When the foregoing steps have been taken, the judge shall, without further proceedings, make a ruling designating the heirs *ab intestato* should he deem it proper, or he may refuse to make such declaration, reserving the rights of the claimants to institute an ordinary action. This ruling may be appealed from both for review and a stay of proceedings.

. . .

"1000. After the declaration of heirs *ab intestato* has been made, by a final judgment or ruling, the proceedings shall be continued according to the procedure prescribed for testamentary proceedings.

"1001. The judge shall order that there be delivered to the heirs instituted all the property, books, and papers of the intestate, and that the administrator render an account of his administration to them, the judicial intervention ceasing."

It is argued that this appointment of the heir *ab intestato* is subject to the limitation that the rights of the heir are not fixed until five years have elapsed from the date of the designation by the court proceedings, and in support of this contention certain sections of the Civil Code of Porto Rico are cited:

Artic Mortg Law

"2. In the registries mentioned in the preceding article shall be recorded:

"1. Instruments transferring or declaring ownership of realty, or of property rights thereto.

"2. Instruments by which rights of use, use and occupancy, emphyteusis, mortgage, annuity, servitudes, and any others by which estates are created, acknowledged, modified, or extinguished. . . .

"23. The instruments mentioned in articles 2 and 5, which are not duly recorded or entered in the registry, cannot prejudice third persons.

"The record of real property and property rights, acquired through an inheritance or legacy, shall not prejudice third persons until five years have elapsed since the date thereof, excepting in cases of testate or intestate inheritances, legacies and additions thereto, when left to legal heirs.

"381. Property acquired through inheritance or legacy cannot be cleared until five years have elapsed from the date of their record in the registry."

But we think this limitation of five years was intended to permit such heirs at law or parties beneficially interested in the estate to assert their rights as against the heir and the property in his hands, and to prevent its transfer except subject to the right of such persons to assert their claims within the permitted limitation. We are here dealing with the right to collect the assets, and the Code provides, secs. 1000, 1001, that after the designation of the heir or heirs *ab intestato* by a final judgment or ruling of the court the proceedings shall be continued according to the procedure prescribed for testamentary proceedings, and the judge may order that all the property, books and papers of the intestate be turned over to the heirs, and that the administrator render his account of his administration of the estate, and thereupon judicial intervention shall cease. It seems to us manifest that the effect of these proceedings is to permit the heir *ab intestato*, after such final decision, to receive and collect the estate. It may be that others will establish an interest in the property for which the heir will have to respond, and it is specially provided that, for the purpose of transfer, property shall not be deemed clear until after five years have elapsed. But this does not require that the collection of debts shall be delayed for a like period or that they shall be paid to the legally declared heir or heirs, upon pain of being required to respond to others who may within the limitation permitted establish a right to the property. Such construction would seem to be unreasonable, and we are cited to no authority that goes to that extent. It is opposed to the practice of the civil law upon which the Code of Porto Rico is based, in which system the heir by intestacy corresponded with the common law administrator, except that the Roman heir was entitled to administer both the real and personal estate. Story on Conflict of Laws, § 508.

In the present case the first installment was due in May 15, 1893, and was paid into the court of first instance according to its order and a receipt given therefor under the seal of the court on June 22, 1893. This was done before any proceedings were instituted by the plaintiff in error. The payment was made under the order of the court, and we see no reason why the defendant in error should not be discharged thereby.

As to the second installment, other considerations apply. Sarria testified that while this installment fell due on May 15, 1894, he paid the same on April 1, 1894, to Maria Belen, which payment, he says, was solemnized by a notarial act duly acknowledged. As to this payment, the court in its charge took the view that the contentious suit of Adolfo Sixto was not commenced until April 4, 1894, of which fact Sarria was not notified until June 5, 1894, and therefore Maria Belen had the right to collect this payment. The suit of April 4, 1894, was the one begun by Adolfo Sixto after the decision against him in the court of first instance, holding that

he could only contest the right of Maria Belen by a contentious proceeding, from which the plaintiff in error took an appeal, but abandoned the same, and on April 4, 1894, amended the suit to a contentious proceeding, making Maria Belen a party defendant, and seeking for an order to the registrar to make a cautionary order touching the property in controversy, and also an order to the defendant in error requiring him to retain at the disposition of the court whatever sums he owed to the estate of Manuel Sixto, deceased. On the day of the beginning of this contentious suit, Sarria paid to Maria Belen, anticipating the maturity of the installment by more than a month, the amount which would have fallen due on the fifteenth day of May following.

We think that, in view of the testimony produced, the validity of this payment should have been submitted to the jury under proper instructions. The plaintiff testified that he was known to the defendant, and that the latter was well aware that he was a son of Manuel Sixto, deceased. The proceeding to declare his rights had been begun. It is evident from a letter written to him on November 11, 1892, by Maria Belen, that she recognized the plaintiff in error as her brother, for in this letter she announces the death of "our beloved father," subscribed herself as "sister," and requests Sixto to come over to Vieques at once, as his presence was necessary in order to collect money coming from the estate. Under these circumstances, the question of whether Sarria had notice of the plaintiff in error's rights and demands, and whether this was a valid payment, or was made in anticipation of the possible claims of Adolfo Sixto, with intent to deprive him of his rights, should have been left to the jury, instead of the instruction given which practically required a finding for the defendant in error.

As to the third and fourth installments, the defendant claims to have paid these to one Roig. It appears that these alleged payments to Roig were evidenced by certain notarial instruments, which became of record in the office of the registrar of deeds, and, as is recited in that record, Roig appears to have been the declared purchaser of the third and fourth installments by assignment from Maria Belen, and the court of first instance, on April 25, 1896, at the instance of Sarria, permitted him to withdraw the third installment, and declared Roig entitled to collect the third and fourth installments. Upon this subject the court charged the jury:

"In this contentious suit by Adolfo Sixto against Belen, this defendant, Sarria, was ordered on June 2, 1894, to pay into court whatever money he might be owing. That order was served on Sarria on June 5, 1894, and afterwards that court decided that Sixto, the plaintiff in this suit, was not entitled to attach this money. He obtained an appeal from that judgment, but not from that portion of it that cancelled the annotation made in the registry of deeds of the attachment of that fund. Subsequently, on

November 17, 1894, an appeal was allowed in the upper court from that portion of it, but no notice was given as to Sarria, who was merely a garnishee in the suit, and who had received no notice not to pay over the money until the lower court decided whether he had the right to pay it over. Between the time the court decided the attachment and the time the appeal was allowed in the upper court, Belen Sixto assigned to Roig the third and fourth installments. I say to you, as a matter of law, that there was nothing to hinder her from doing that at that time; she had, in law, the right to do it."

The counsel for the plaintiff requested the court, upon the same subject, to charge:

"As it is shown by the uncontradicted evidence that the judge of the court of first instance of Humacao was entirely without authority or jurisdiction to issue his order on August 30, 1894, directing the registrar to make annotation on his books of said order, said order to the registrar was void and the annotation made by the registrar was void, and the former annotation remained in force, which was notice to all the world, including this defendant, that the plaintiff had an interest in those payments such as might be declared by the court; and the court having afterwards decided that the plaintiff here is entitled to a one-half interest in said estate, the plaintiff is now entitled to recover one-half of the last two payments, with interest."

It appears that Adolfo Sixto was not a party to the suit between Roig and Sarria, in which it is declared that Roig was held entitled to recover the third installment, and if Sarria had notice of the pendency of the suit to establish the rights of Adolfo Sixto in such wise as to be bound by the result thereof, he could not prevent Sixto's recovering an interest in the property by wrongfully paying it over in the proceedings to which the plaintiff in error was not a party. The court below seems to have given its charge upon this subject upon the theory that the order of August 30, 1894, was not appealed from in such wise as to prevent Sarria from paying the third and fourth installments to the assignee Roig, and it is said that he was merely a garnishee in the suit, and had then received no notice not pay over the money until the lower court had decided whether he had the right to pay it over. The payment of the third and fourth installments was made to Roig by permitting Sarria, in the court of first instance, to withdraw the installment which he had paid into court under the order of June 2, 1894. These installments were paid to Roig on May 16, 1896, but in the attitude of the suit then pending to establish the rights of Adolfo Sixto, and Sarria's knowledge thereof, could the latter legally make these payments so as to conclude the rights of the plaintiff in error? It is true that the lower court on August 30, 1894, had held in favor of Maria Belen, vacating the notice sent to Sarria and the cautionary notices to the registrar, and the plaintiff in error had prayed an appeal "in both effects," *i. e.*, for a review of the order and a stay of proceedings, but was refused an appeal

in the latter aspect, from which refusal he also appealed, and this was the attitude of the case at the time of the alleged purchase by Roig on September 11, 1894. On November 17, 1894, the audiencia considered the application of Sixto for the enlargement of the appeal, and held that such allowance was wrongfully denied in the lower court, and ordered that the appeal be "considered as having been taken for both effects." On the 8th of January, 1895, Sarria was notified of this order, and appeared and asked that a clear and detailed statement be given him "as to what he was to comply with." Thereupon a new explanatory order was directed to Sarria, informing him that the previous requisition meant the ratification of the one previously directed to him by the court, "in order that the sums which he owed from that time to Mr. Manuel Sixto should not be delivered by him except to the court in order to deposit the same in the royal treasury." This order was duly served on Sarria on February 5, 1895.

On November 29, 1895, the audiencia heard the appeal, and, reversing the order of August 30, declared the order of June 2, 1894, in full force, whereby the cautionary entry was ordered to be made by the registrar of property, and the notification ordered to Sarria to hold the payments on the mortgage or pay the same into the treasury, to abide the order of the court.

The registrar refused to comply, assigning as a reason that the encumbrance had been assigned to third parties and that the mortgage law did not justify such an order. Subsequent proceedings resulted in the final decree of the military court deciding the merits of the controversy in favor of Sixto. The decision of November 29, 1895, was also notified to Sarria, and on May 4, 1896, the entry of the court discloses:

"On May 4, 1896, appeared Mr. Laureano Sarria y Gonzalez and stated: that, having received notice that the installment of the mortgage had been transferred to Mr. Antonio Roig, who has recorded said transfer in the registry of property, and supposing that he will proceed to collect the same judicially, as he did the previous installment, he is unable to accept the notification, and he will appear before the audiencia in the premises."

Over the objection of the plaintiff in error, Sarria was permitted to testify that he paid the installment to Roig by order of the audiencia. But the plaintiff in error was not a party to such proceeding, if it had been legally proved, and of course could not be concluded by it. On being notified that the order of June 2, 1894, was in full force, requiring him to hold the funds, while Sarria says he is unable to accept the notification, he declares "he will appear before the audiencia in the premises." Instead of so doing, unless the appearance in the Roig case can be so considered, he made application in the court of first instance for a release of the deposited installment in order to pay it to Roig, and that court made the order,

although it had been notified of the decision of the audiencia of November 29, 1895. This order could have no effect on the rights of the plaintiff in error, nor can it protect Sarria, who acted in the face of knowledge of the decision of the higher court instead of appearing in that court at the suit of Sixto, and having the rights of Roig and the contesting heirs determined. We conclude that the plaintiff in error had the right to recover his share of the third and fourth installments, notwithstanding the alleged transfers and payments to Roig, and the alleged decree of the audiencia in a proceeding to which Sixto was not a party.

For error in the court's charge as to the second, third and fourth installments, the judgment will be reversed and the cause remanded for further proceedings consistent with this opinion.

True copy.

Test:

Clerk Supreme Court, U. S.